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Supreme Court of the United States

OCTOBER TERM, 1938

No. 205

UNITED STATES OF AMERICA, EX REL. ANASTASIOS KIRKPOULOS AND ELIZABETH HINTOPOULOS, PETITIONERS,

vs.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE AT THE PORT OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 24, 1938

CERTIORARI AND STAY GRANTED NOVEMBER 7, 1938

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 205

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(ORIGINAL)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, ex rel. ANASTASIOS HINTOPOULOS and ELIZABETH HINTOPOULOS, Relators-Appellants

against

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization at the Port of New York, Respondent-Appellee

APPENDIX OF RELATORS-APPELLANTS

Jay Nicholas Long, Attorney for Relators-Appellants, 25 Broadway, New York 4, N. Y.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. ANASTASIOS HINTOPOLOUS and ELIZABETH HINTOPOULOS, Relators-Appellants

against

EDWARD J. SHAUGHESSY, District Director of Immigration and Naturalization at the Port of New York, Respondent-Appellee.

Appendix to Appellants' Brief

DOCKET ENTRIES

1955

July 14—Filed Petition for Writ of Habeas Corpus & Issued Writ—Ret. 7-19-55.

Aug. 1—Filed Return to writ.

Aug. 1—Filed traverse.

Aug. 1—Filed opinion #22,070. Writ dismissed—So ordered—Dawson, J.—Mailed notice of entry 8-1-55.

Aug. 4—Filed affidavit & show cause order to admit pet'r to bail pending appeal and staying deportation,—ret. 8-9-55.

1955

Aug. 9—Memo endorsed on motion filed 8-4-55—Referred to Dawson, J.—Lumbard, C. J.

[fol. 2] Aug. 11—Filed copy of show cause filed 8-4-55—Motion denied—Dawson, J.—Mailed notice of entry 8-13-55.

Aug. 11—Filed opposing affdvt.

Aug. 11—Filed relators' notice of appeal—Mailed copy to US Atty 8-13-55.

Aug. 12—Filed Recognizance—$1,000.00—Indemnity Ins. Co. of North America.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

OPINION AND ORDER NO. 22,070 OF JUDGE DAWSON FROM WHICH APPEAL IS TAKEN—AUGUST 1, 1955

Appearances:

Jay Nicholas Long, of New York, N. Y., Attorney for Relators.

Lloyd F. MacMahon, United States Attorney for the Southern District of New York, Attorney for Respondent; Lester Friedman, Attorney in the Office of the District Counsel, Immigration and Naturalization Service, Department of Justice, of Counsel.

[fol. 3] DAWSON, D. J.:

This matter, brought up by the issuance of a writ of habeas corpus, involves the question as to whether the denial to petitioners of suspension of deportation by the Attorney General was an abuse of discretion by the Attorney General.

The undisputed facts show that the relators are citizens of Greece who are now illegally in the United States. They last entered the United States in 1951 as members of a crew of a Greek steamship. They were granted shore leave for the period of time the vessel on which they arrived remained in port, but in no event to exceed twenty-nine days. They failed to depart from the United States before the expiration of their period of temporary admission and did not apply for any extension of this period.

In April, 1952, warrants of arrest were duly issued by the District Director of Immigration and Naturalization charging that the relators were unlawfully in the United States and subject to deportation. A hearing was accorded to the relators. The Hearing Officer made his decision, finding both relators deportable and denying their applications for suspension of deportation. An appeal was taken to the Board of Immigration Appeals, and that Board, on March 18, 1954, made an order denying their applications for suspension of deportation and dismissing their appeal. They were given permission to depart voluntarily from the United States.

Relators did not depart from the United States, but on April 19, 1954, filed a motion addressed to the Board of Immigration Appeals requesting that the proceedings be re-opened and their applications for suspension of deportation reconsidered. On May 5, 1954, the Board of Immigration Appeals denied relators' motion. They were given until August 20, 1954 within which to avail themselves of the privilege of voluntary departure. On May 11, [fol. 4] 1955, they submitted another motion addressed to the Board or Immigration Appeals asking that the administrative proceedings be re-opened and their application for suspension of deportation reconsidered. These motions were denied by the Board of Immigration Appeals on June 3, 1955.

On July 12, 1955, relators submitted an application that their deportation be stayed on the ground that the deportation could possibly endanger the life of the relator Elizabeth Hintopoulos and would involve "the possible loss of the unborn child with whom she is now in the fifth month of pregnancy". On July 13, 1955, this relator was examined by a surgeon of the United States Public Health Service who certified that she was able to travel without danger to life; that she required no immediate medical treatment, and that she could travel aboard a vessel having a physician aboard. Thereupon, relators' application for a stay of deportation was denied and they were taken into custody for deportation.

Relators do not deny that they are illegally in the Country and are subject to deportation. They urge, however,

that they were eligible for suspension of deportation under the provisions of § 19(c) of the Immigration Act of 1917, as amended, and that the refusal of the Attorney General to suspend deportaion under the provisions of this statute was an abuse of discretion.

The respondent admits that relators came within the category of the persons for whom the Attorney General might suspend deportation. Respondent urges, however, that the suspension of deportation under the provisions of this statute is purely a matter of the discretion of the Attorney General; that the Attorney General exercised his discretion and did not exercise it capriciously or arbitrarily.

It is well established that the Courts may not review the exercise of such discretion by the Attorney General, [fol. 5] and that they may interfere only where there has been a clear abuse of discretion or a clear failure to exercise discretion. In such cases, the Court can do no more than to require that the discretion be properly exercised. *United States ex rel. Kaloudis* v. *Shaughnessy* (C. A. 2, 1950), 180 F. 2d 489; *United States ex rel. Adel* v. *Shaughnessy* (C. A. 2, 1950), 183 F. 2d 371; *United States ex rel. James* v. *Shaughnessy* (C. A. 2, 1953), 202 F. 2d 519, cert. den. 345 U. S. 969.

The administrative record which was submitted in connection with this proceeding shows that the Board of Immigration Appeals recognized that relators had established the statutory requirements for discretionary suspension of deportation under § 19(c) of the Immigration Act of 1917, as amended, and that the Board recognized that the deportation of relators might result in "serious economic detriment" to their citizen minor child. After considering these matters, however, the Board denied the suspension of deportation as a matter of administrative discretion.

Prior to the final determination of this matter by the Board of Immigration Appeals, Congress had enacted the Immigration and Nationality Act, of 1952. Under the 1917 Act, as amended, the application for suspension of deportation had to show "serious economic detriment". Under the 1952 Act, the applicant would have to show that the deportation would "result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child", 8 U. S. C. § 1254(a)(1).

In the consideration of the 1952 Act in Congress, this change in the test to be applied to suspension of deportation was considered. The Senate Judiciary Committee, in its report on the Bill which subsequently became law, said:

> "The bill accordingly establishes a policy that the administrative remedy should be available only in the very limited category of cases in which the deporta-
> [fol. 6] tion of the alien would be unconscionable. Hardship, or even unusual hardship to the alien or to his spouse, parent, or child is not sufficient to justify suspension of deportation."*

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* The Senate Judiciary Committee stated in Senate report No. 1137, with reference to the Bill which subsequently became law, as follows:

> "The term 'exceptional and extremely unusual hardship' requires some explanation. The committee is aware that in almost all cases of deportation, hardship and frequently unusual hardship is experienced by the alien or the members of his family who may be separated from the alien. The committee is aware, too, of the progressively increasing number of cases in which aliens are deliberately flouting our immigration laws by the processes of gaining admission to the United States illegally or ostensibly as non-immigrants but with the intention of establishing themselves in a situation in which they may subsequently have access to some administrative remedy to adjust their status to that of permanent residents. The practice is grossly unfair to aliens who await their turns on the quota waiting lists and who are deprived of their quota numbers in favor of aliens who indulge in the practice. This practice is threatening our entire immigration system and the incentive for the practice must be removed. Accordingly, under the bill, to justify the suspension of deportation the hardship must not only be unusual but must also be exceptionally and extremely unusual. The bill accordingly establishes a policy that the administrative remedy should be available only in the very limited category of cases in which the deportation of the

The Attorney General, in exercising his discretion, could take into account the new standard which was laid [fol. 7] down by Congress. The new standard was referred to in the decision of the Board of Immigration and Appeals of May 5, 1954. The Board in that opinion recognized that the deportation might result in "serious economic detriment to the American born infant child", but concluded that this was not alone enough to warrant suspension of deportation. The Board pointed out that the child at the time of the decision in 1954 was about two and one-half years old; that the parents had been in the United States for a period of less than three years; that both had arrived in this Country as seamen; that they have no other dependents or close family ties here, and the made relator may be able to obtain work as a Greek seaman and earn about $85 per month.

Under the circumstances, it appears clear that the Board of Immigration Appeals, acting for and on behalf of the Attorney General, exercised its discretion; that it did not capriciously exercise its discretion or abuse its discretion. Under the circumstances, this Court has no power to review this exercise of discretion by the Attorney General.

The writ of habeas corpus is dismissed. So ordered.

Dated: New York, N. Y., August 1, 1955.

Archie Dawson, U. S. D. J.

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alien would be unconscionable. Hardship or even unusual hardship to the alien or to his spouse, parent, or child is not sufficient to justify suspension of deportation. To continue in the pattern existing under the present law is to make a mockery of our immigration system." (Quoted in "Commentary on the Immigration and Nationality Act" by Walter M. Besterman, Legislative Assistant, Committee on the Judiciaries, House of Representatives, Vol. 8 U.S.C. p. 67.)

[fol. 8] UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

DECISION AND ORDER OF HEARING OFFICER, DATED MAY 29, 1952

Files: A— New York (0300/408917) (male)
A— (0300/408918) (female)

In re: Anastasios Hintopoulos (male)

and

Elizabeth Hintopoulos ~~nee~~ Bozatsidis a/k/a Zogrofou

In Deportation Proceedings

In Behalf of Respondents:

No one.

Charges:

Warrant: Act of 1924—No Immigration Visa.
Lodged: None.

Application:

Suspension of deportation—Economic detriment.
Voluntary Departure in the alternative.

Detention Status:

(For both) Released on conditional parole.
Oral Decision of Hearing Officer.
Entered on May 29, 1952.

[fol. 9] DISCUSSION:

This record relates to a husband and wife, both Greek citizens now 38-years-old and 28-years-old respectively. The husband who is a native of Turkey last arrived in the United States at the port of Baltimore, Maryland, August 15, 1951 when he was admitted as a seaman on the SS "PANAGIOTIS KOUMANDAROS". That entry has been verified. He has stated that he then left his ship because of his wife's illness and that he intended to remain in this

country until such time as she recovered. Admittedly, however, he did not know what period of time that might take. He never applied for an extension of his stay and has never been in possession of an immigration visa to enter this country for permanent residence. Since at the time of his admission it was his intention to remain in the United States for an indefinite period, he was not a bona fide non-immigrant and is therefore now amenable to deportation under the Immigration Act of 1924 as an immigrant without a visa.

The female respondent who is a native of the Soviet Union, last arrived in the United States July 4, 1951 at the port of Newport News, Virginia when she was admitted as a seaman on the SS "PANAGIOTIS KOUMANDAROS", the same ship on which her husband was then serving as a member of crew and on which he last arrived a month later. Her entry also has been verified. Her testimony regarding her intention at the time of her admission was somewhat evasive and contradictory. She stated at one point that at the time of her admission she knew that she was then pregnant and wished to remain in the United States until such time as her child was born. At another point she changed and stated that at the time of her entry she intended to be examined by a doctor ashore to determine whether or not she could continue to travel in her pregnant state. She has [fol. 10] conceded that in any case it was her intention at the time of her arrival to abide by the decision of this doctor as to the length of time she should remain in the United States. She, too, never applied for an extension of her stay and has never had an immigration visa. Since at the time of her admission to the United States last it was her plans to remain in this country for an indefinite period she was not a bona fide non-immigrant then. Her entry was therefore not a lawful one and she is deportable under the Immigration Act of 1924 as an immigrant without a visa.

Both respondents have applied for suspension of deportation on the ground of the economic detriment that would befall their minor son in the event they were deported. They have asked in the alternative for voluntary departure in lieu of deportation. Both disclaim having a criminal record anywhere and both allege that they have been persons of good moral character. Evidence of record would tend to corroborate their testimony in this respect. Their

only income is from the employment of the male respondent on two jobs, the one as a salesman and the other as a superintendent of the apartment house in which they live. His combined income amounts to approximately $64 a week. Their joint assets consist of savings in the sum of about $500 and their furniture and other personal property which they value at $1500. While it would seem that their son, who was born in New York City in November, 1951 would suffer economically if his parents should be deported, it is not believed that as a matter of administrative discretion the respondents' applications for suspension of deportation should be granted. They have been in the United States for a period of less than one year. They have no relatives in this country other than each other and their son. To grant both this form of relief upon the accident of birth in the United States of their son would be to [fol. 11] deprive others, who are patiently awaiting visas under their already oversubscribed quotas. It is noted also that neither respondent reported his and her presence in the United States at any time until January, 1952 when they filed applications for suspension of deportation just two months after the birth of their child. However, since they meet the statutory requirements for the alternative application they have made and since they have indicated that they would be willing and are able to leave this country within the period of approximately thirty days, their applications for voluntary departure in lieu of deportation will be granted. In the event that final order should be for their deportation they have elected to be returned to Greece.

FINDINGS OF FACT:

Upon the basis of all the evidence presented, it is found:

(1) That the respondents are aliens, both citizens of Greece, the male a native of Turkey and the female a native of the Soviet Union.

(2) That the male respondent last entered the United States at the port of Baltimore, Maryland, August 15, 1951 as a seaman on the SS "PANAGIOTIS KOUMANDAROS".

(3) That the female respondent last entered the United States at the port of Newport News, Virginia,

July 4, 1951 as a seaman on the SS "PANAGIOTIS KOUMANDAROS".

(4) That both respondents at the time of their respective entries intended to remain in the United States for an indefinite period.

(5) That neither respondent was in possession of an immigration visa.

[fol. 12] CONCLUSION OF LAW:

Upon the basis of the foregoing findings of fact, it is concluded:

(1) That under Sections 13 and 14 of the Immigration Act of May 26, 1924 the respondents are subject to deportation in that at the time of entry they were immigrants not in possession of valid immigration visas and not exempted from the presentation thereof by said Act or regulations made thereunder.

ORDER:

It is ordered that applications for suspension of deportation be denied.

It is further ordered that orders of deportation be not entered at this time but that the aliens be required to depart from the United States without expense to the Government within such period of time and under such conditions as the Officer in charge of the district deems appropriate.

It is further ordered that if the aliens fail to depart when and as required this privilege of voluntary departure be withdrawn without further notice or proceedings and the aliens deported from the United States pursuant to law on the charge in the Warrants of Arrest.

* * * * * * *

Charles G. McCarthy, Hearing Officer.

R: 5/29/52
T: 7/23/52
CGMcC/mb.

[fol. 13] UNITED STATES DEPARTMENT OF JUSTICE

BOARD OF IMMIGRATION APPEALS

DECISION AND OPINION OF BOARD OF IMMIGRATION APPEALS, DATED MARCH 18, 1954

Files: A-8227824 T.—New York (0300-408917)
A-8227810 T. (0300-408918)

In re:

ANASTASIOS HINTOPOULOS and ELIZABETH HINTOPOULOS nee BOZATSIDIS or ZOGROFOU.

In deportation Proceedings.

In Behalf of Respondents:

Sylvester Pindyck, Esquire
165 Broadway
New York 6, New York

(Heard: January 23, 1953).

Charges:

Warrant: Act of 1924—No immigration visas.
Lodged: None.

Application:

Suspension of deportation—Economic detriment (Act of 1917, as amended.) (Both.)

This appeal relates to two persons, husband and wife, ages 38 and 28 years respectively, and is from a decision of a hearing officer at New York on May 29, 1952. The respondents have been found deportable on the charge in [fol. 14] the respective warrants of arrest and have been granted voluntary departure as the maximum discretionary relief. The sole issue on appeal is whether the respondents should be granted suspension of deportation.

The male respondent is a native of Turkey, citizen of Greece, who last entered the United States on August 15, 1951 at Baltimore, Maryland as a crewman on the SS "Panagiotis Koumandaros". His entry has been verified.

His testimony shows that he entered this country to remain for an indefinite period and that he never sought an extension of the period of stay as a seaman. He is deportable under the Immigration Act of 1924 on the charge in the warrant of arrest which relates to him.

The female respondent is a native and subject of the Soviet Union. She last entered the United States on July 4, 1951 at Newport News, Virginia after arrival as a seaman on the SS "Panagiotis Koumandaros". Her entry has been verified. She alleges that she failed to depart because of illness and physical condition in that she was expecting the birth of her child. It is obvious that she intended to remain in this country for an indefinite period and never sought to obtain an extension of the period for which she was admitted as a crewman. She is clearly deportable under the Immigration Act of 1924 on the charge in the warrant of arrest which relates to her.

The respondents have requested suspension of deportation and have predicated their applications on a serious economic detriment that would result to their American citizen child, born in this country in November 1951. These respondents were married prior to coming to this country and at the time of last entry the female respondent was expecting the birth of her child. The male respondent is employed and earns about $64 weekly. The joint assets consist of about $500 in cash and personal property of the value of about $1500. It is obvious that the American citizen infant child is dependent upon the alien parents for economic support, care and maintenance. Documentary [fol. 15] and other evidence establish good moral character for the requisite period. The aliens have no connection with subversive groups.

In the argument of counsel in support of the appeals, there are cited three decisions, two by this Board in 1947 and 1949, respectively; and one by the Commissioner for the Service decided in 1951. Counsel alleges that the facts in the cases he has referred to are similar to the facts in the instant case and that maximum discretionary relief was granted in the cases cited by him.

The first decision relied upon by counsel is *Matter of T—*, Int. Dec. 142, 3 I. & N. Dec. 707 (B. I. A. November 25, 1949). That decision involved an application for suspen-

sion or deportation by an alien mother illegally residing in this country and her legally resident alien husband and a two-year-old American citizen child. In other words, the family consisted of one alien illegally residing in this country, an alien legally residing herein, and an American citizen infant child. We find that the situation is clearly distinguishable from the facts in the case before us in which we have two illegally resident alien parents and one American citizen infant child.

The second decision referred to by counsel is *Matter of C—*, 2 I. & N. Dec. 895 (B. I. A. October 9, 1947). That case involved the welfare of an alien father who had resided illegally in the United States for a period of seven years, and a native-born United States citizen spouse and two native-born American citizen minor children. We find that this situation is clearly distinguishable from the family situation in the instant case.

The last case referred to by counsel is a situation where there were two aliens, husband and wife, who had been in the United States for a period of four years illegally. They were the parents of an American citizen infant child who was dependent on them for support. Their applications for suspension of deportation were favorably considered [fol. 16] and the case was referred to the Congress on May 1, 1951.

As stated above, we have, in the instant case, a family consisting of two alien parents illegally residing in the United States and one American citizen child, age about two and one-half years. These respondents have been in the United States for a period of less than three years. Both arrived in this country as seamen. They have no other dependents or close family ties here. The record indicates that the male respondent may be able to obtain work as a Greek seaman and earn about $85 monthly.

Notwithstanding the fact that the family situation in the case before us is similar to the situation in the case last referred to by counsel, in which a decision was made in 1951; and notwithstanding the fact that the deportation of these respondents would result in a serious economic detriment to an American citizen infant child, the granting or withholding of maximum discretionary relief depends on the factors and merits in each individual case, and is a

matter of administrative discretion.[1] We have carefully examined the facts and circumstances in the instant case and we find that the granting of the maximum relief is not warranted by the record in the case. The appeals will be dismissed.

ORDER:

It is ordered that the applications of these aliens for suspension of deportation be denied.

It is further ordered that the appeals of the subject aliens be and the same are hereby dismissed.

Thos. G. Finucane, Chairman.

[fol. 17] UNITED STATES DEPARTMENT OF JUSTICE

BOARD OF IMMIGRATION APPEALS

DECISION AND OPINION OF BOARD OF IMMIGRATION APPEALS, DATED MAY 5, 1954

Files: A-8227824 T
A-8227810 T
New York (0300-408917)
(0300-408918)

In the Matter of ANASTASIOS HINTOPOULOS and ELIZABETH HISTOPOULOS nee BOZATSIDIS or ZOGROFU

In Deportation Proceedings

In Behalf of Respondents: J. Nicholas Long, Esquire, 25 Broadway, New York 4, New York.

These cases are before us on counsel's motion to reopen the proceedings for reconsideration of the respondents' applications for suspension of deportation.

The male respondent last entered the United States on August 15, 1951 and the female respondent on July 4, 1951. Both arrived as seamen and have been found deport-

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[1] *Weddeke* v. *Watkins*, 166 F. 2d 369; and *Kalpudis* v. *Shaughnessy*, 180 F. 2d 489.

able on the charge that they were immigrants at the time of entry and were not in possession of immigration visas. [fol. 18] They have one child who was born in the United States during November 1951. On March 18, 1954, we dismissed the appeals of the respondents from the hearing officer's decision granting voluntary departure and denying suspension of deportation. After considering all the facts in the case at that time, we denied suspension of deportation as a matter of administrative discretion.

Counsel's motion sets forth no matters of which we were unaware at the time our previous decision was rendered. It is crystal clear that Congress intended to greatly restrict the granting of suspension of deportation by the change of phraseology which was used in Section 244(a) of the Immigration and Nationality Act as well as the Congressional comment at the time this provision was enacted. We indicated in our previous order that the deportation of the respondents would result in a serious economic detriment to their citizen minor child, and we do not question that the respondents have established the statutory requirements for suspension of deportation under Section 19(c) of the Immigration Act of 1917, as amended.

Counsel argues that the two court decisions cited in our previous order [1] involved grounds for deportation specified in Section 19(d) of the Immigration Act of 1917, as amended. These cases were not within the purview of Section 19(d) although one alien had been convicted of incest and the other had been a member of the International Workers Order. Weddeke was not deportable because of his conviction and Kaloudis was not charged with being deportable because of his membership in the International Workers Order. In both cases, the decision of the court was predicated on the fact that, regardless of whether the aliens had established or could establish statutory eligi- [fols. 19-21] bility, the question of whether suspension of deportation should be granted was entirely discretionary with the Attorney General and his decision was not reviewable by a court unless clearly arbitrary.

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[1] *U. S. ex rel Weddeke* v. *Watkins*, 166 F. 2d 369 (C. A. 2, cert. denied 333 U.S. 876); *Kaloudis* v. *Shaughnessy*, 180 F. 2d 489.

Upon our further review of the cases of the two respondents, we adhere to our previous decision that suspension of deportation should be denied as a matter of administrative discretion and counsel's motion will, therefore, be denied.

Order: It is ordered that counsel's motion be and the same is hereby denied.

Thos. G. Finucane, Chairman.

[fol. 22] [Endorsed:] United States Court of Appeals, Second Circuit. Filed Aug. 1955. A. Daniel Fusaro, Clerk.

[fol. 23] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1955.

No. 144

Docket No. 23809

UNITED STATES OF AMERICA, ex rel. ANASTASIOS HINTOPOULOS and ELIZABETH HINTOPOULOS, Relators-Appellants

v.

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization at the Port of New York, Respondent-Appellee.

OPINION—May 9, 1956

Before: FRANK, HINCKS and WATERMAN, Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Archie O. Dawson, Judge, dismissing a writ of habeas corpus. Affirmed.

Jay Nicholas Long, New York, N. Y., for Relators-Apellants.

Teresa S. Reardon, Asst. U. S. Atty., S. D. N. Y. (Paul W. Williams, U. S. Attorney, S. D. N. Y.; Roy Babitt, Attorney, Immigration and Naturalization Service, on the brief), for Respondent-Appellee.

[fol. 24] HINCKS, Circuit Judge:

This appeal from an order dismissing a writ of habeas corpus turns upon the validity of an order of the Board of Immigration Appeals denying the appellants' request for suspension of deportation.

The facts are substantially as follows. The appellants are husband and wife, both Greek citizens. Both were admitted to the United States as seamen, the wife at Newport News, Virginia, on July 4, 1951 and the husband at Baltimore, Maryland, on August 15, 1951. At the time the female entered the United States she was six months pregnant and journeyed to New York to seek medical advice where her husband joined her at the later date when his ship next arrived in the United States. Their child was born in the United States on November 11, 1951 and thus by reason of his nativity is an American citizen. On January 4, 1952, the appellants voluntarily disclosed their illegal presence and made application to the Immigration Service for suspension of deportation. On Apri 9, 1952, warrants issued for their arrest in deportation proceedings, and on May 29, 1952 they were accorded a hearing thereunder at Ellis Island. The Hearing Officer found them deportable for entry into the United States with intent to remain indefinitely without possession of immigration visas, and denied their application for suspension of deportation. The Board of Immigration Appeals affirmed the decision of the Hearing Officer in an opinion dated March 18, 1954. On May 5, 1954, the Board reiterated its conclusion in denying a motion to reopen the proceedings. Thereafter, the appellants were taken into custody for deportation and a writ of habeas corpus was issued on July 14, 1955. On August 1, 1955, the United States District Court for the Southern District of New York, per Dawson, *J.*, dismissed the writ and upheld the decision of the Board as a proper exercise of the Attor-[fol. 25] ney General's discretionary power to grant or deny the relief requested. The present appeal is prosecuted from the dismissal of the writ below.

On this appeal, as below, the appellants do not question their deportability. Their attack on the administrative order is confined to so much thereof as denied their request for suspension of deportation. As to this the applicable

statute is the Immigration and Nationality Act of June 23, 1940, c. 439, §20(c) (which amended 39 Stat. 889) which, so far as here pertinent, provides:

> "In the case of any alien * * * who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may suspend deportation of such alien * * * if he finds that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the * * * minor child of such deportable alien."

It is clear that under this statute the "good moral character" of the appellants for five years and resultant "serious economic detriment [to] their minor child" were essential qualifications for the eligibility of these appellants for suspension of their deportation. In the administrative proceedings it was found that both these qualifications existed and that the appellants were indeed eligible. Notwithstanding, the Attorney General, through the Board of Immigration Appeals as his administrative delegate, in the exercise of the discretion vested in him by the Act, refused to grant a suspension.

To determine the validity of that action we look first to the opinion of the Board of Immigration Appeals of March 18, 1954. In that opinion, its Board took note of the financial condition of the appellants and went on to say:

> [fol. 26] " * * * It is obvious that the American citizen infant child is dependent upon the alien parents for economic support, care and maintenance. Documentary and other evidence established good moral character for the requisite period. The aliens have no connection with subversive groups."

It concluded its opinion with these two paragraphs:

> "As stated above, we have, in the instant case, a family consisting of two alien parents illegally residing in the United States and one American citizen child, age about two and one-half years. These respondents have been in the United States for a period of less than

three years. Both arrived in this country as seamen. They have no other dependents or close family ties here. The record indicates that the male respondent may be able to obtain work as a Greek seaman and earn about $85 monthly.

"Notwithstanding the fact that the family situation in the case before us is similar to the situation in the case last referred to by counsel, in which a decision was made in 1951; and notwithstanding the fact that the deportation of these respondents would result *in a serious economic detriment to an American citizen infant child,* the granting or withholding of maximum discretionary relief depends on the factors and merits in each individual case, and is a matter of administrative discretion.[1] We have carefully examined the facts

* * * * * *

and circumstances in the instane case and we find that the granting of the maximum relief is not warranted by the record in the case. The appeals will be dismissed.

* * * * * *

[fol. 27] The emphasis which we have added to the second paragraph just quoted shows unmistakably that the Board recognized that the applicable hardship test of eligibility was "a serious economic detriment to an American citizen," which was the precise test of eligibility for suspension provided in the applicable statute from which we quote above. On that basis, it found that the appellants were in all respects eligible for suspension. But in the belief that the exercise of its discretion under the statute "depends on the factors and events in each individual case" the Board denied suspension as "not warranted by the record in this case."

We see nothing in the opinion, or indeed in the underlying record, to suggest that the determination was arbitrary or based on irrelevant or improper considerations.

"[1] *Weddeke* v. *Watkins,* 166 F. 2d 369; and *Kaloudis* v. *Shaughnessy,* 180 F. 2d 489."

We cannot say as a matter of law that if, as a result of the parents' deportation, the minor child shall be reared, say, in Athens instead of in Brooklyn, that the resulting economic detriment to the child—which was recognized—is a factor of sufficient gravity to withhold the deportation of aliens who had entered this country with intent to remain indefinitely, in violation of the immigration laws, less than a year before the decision of the Hearing Officer which first ordered their deportation. We conclude that under our former decisions which the Board cited in its March 18th opinion—*Weddeke* and *Kaloudis*—the Board's action would have been unassailable if the administrative proceedings had stopped there. That conclusion is further supported by *United States, ex rel. James* v. *Shaughnessy*, 2 Cir., 202 F. 2d 519; *United States, ex rel. Adel* v. *Shaughnessy*, 2 Cir., 183 F. 2d 371; *United States, ex rel. Sleddens* v. *Shaughnessy*, 2 Cir., 177 F. 2d 363.

But thereafter the appellants made a motion to reopen the proceedings for reconsideration of the prior applica- [fol. 28] tions for suspension. This motion the Board denied with a short opinion dated May 5, 1954. In that opinion, it said:

> "Counsel's motion sets forth no matters of which we were unaware at the time our previous decision was rendered. It is crystal clear that Congress intended to greatly restrict the granting of suspension of deportation by the change of phraseology which was used in Section 244(a) of the Immigration and Nationality Act as well as the Congressional comment at the time his provision was enacted. We indicated in our previous order that the deportation of the respondents would result in a serious economic detriment to their citizen minor child, and we do not question that the respondents have established the statutory requirements for suspension of deportation under Section 19(c) of the Immigration Act of 1917, as amended."
>
> . . . . . .
>
> "Upon our further review of the cases of the two respondents, we adhere to our previous decision that suspension of deportation should be denied as a matter

of administrative discretion and counsel's motion will, therefore, be denied."

By these two paragraphs the Board made it abundantly clear that it adhered to its previous holding that the appellants' eligibility for a suspension was controlled by the 1940 Act; that under that Act the appellants were indeed eligible; and that *in the exercise of its discretion* it denied the suspension applied for. Having thus stated that its decision was made in the exercise of its discretion, we see no room whatever for the argument that the Board had failed or refused to exercise its discretion. In this respect, the case here is distinguishable from *Mastrapasqua* v. *Shaughnessy*, 2 Cir., 180 F. 2d 999, in which the Board had [fol. 29] refused to exercise its discretion. And since the Board found the appellants eligible for a suspension under the eligibility standard of the 1940 Act, its decision was not in conflict with our decision in *United States ex rel. Zacharias* v. *Shaughnessy*, 221 F. 2d 578.

The only remaining question is whether in its May opinion the reference to Section 244(a) of the Immigration and Nationality Act of 1952 indicates that in the formulation of its discretion the Board was improperly influenced by Congressional policy as manifested by the later Act. As to this, it will be noted that neither the 1940 Act nor the 1952 Act provide any indication of the factors which shall control the formulation of the discretion granted under each, once the respective eligibility requirements are found to exist—as they were here—the Board has untrammeled discretion to grant or withhold a suspension. Only if the discretion is shown to have been formulated on arbitrary or illegal considerations may the courts interfere. *United States ex rel. Kaloudis* v. *Shaughnessy*, 2 Cir., 180 F. 2d 489. This broad discretionary power was apparently granted in order to give the deportation provisions of the law some flexibility in cases involving more than usual hardship, the nature and gravity of which would vary with each case as it should thereafter arise. The appellants do not contend that the grant of discretion is unconstitutional for lack of specified standards governing its formulation. Such a contention, even if sound, would not help them. For if the grant of power were invalid, the appellants and all

other hardship cases would stand confronted with rigid deportation provisions as were their predecessors before the law was liberalized.

Since the Board had this broad power (in the comparatively narrow field which comprises those found eligible for a suspension) we think that in the formulation of its discretion it might properly take into account among other [fol. 30] factors its concept of Congressional policy as manifested in Section 244(a) of the 1952 Act. In *United States ex rel. Kaloudis* v. *Shaughnessy, supra,* at page 491, we said:

> "* * * The power of the Attorney General to suspend deportation is a dispensing power, like a judge's power to suspend the execution of a sentence, or the President's to pardon a convict. It is a matter of grace, over which courts have no review, unless—as we are assuming—it affirmatively appears that the denial has been actuated by considerations that Congress could not have intended to make relevant."

Let us somewhat develop the analogy there suggested by posing the situation which may confront a judge when he comes to impose sentence on, say, a convicted narcotic peddler. He is besought to dispose of the case by suspension of sentence and imposition of probation as under the applicable law he has power to do. In the exercise of his discretion he refuses to suspend and imposes a sentence to be served. Surely the sentence imposed is not invalid because his discretion was to some extent expressly affected by prevalent contemporary opinion that the public interest required more rigorous treatment of narcotic violators, whether such opinion was disclosed in recent Acts of Congress stiffening the penalties for such violators or merely in the public press. Doubtless a just judge will not abdicate his powers to public clamor or even to legislative opinion which does not purport to control formulation of his discretionary powers. But a wise judge will not put forth judgments from an ivory tower shutting his eyes to contemporary *mores* and public opinion.

Our conclusion is not in conflict with Section 405 of the 1952 Act. That section provides that "Nothing contained

in this Act * * * shall be construed to affect any proceedings * * * brought * * * at the time this Act shall take [fol. 31] effect; *but* as to all such * * * proceedings * * * *the statutes* * * * *repealed* by this Act *are* * * * *hereby continued in force* and effect." (Emphasis supplied.) We think that "nothing contained in this Act" means *no operative provision* of this Act such as the provision establishing the standard of eligibility. Cf. *United States ex rel. Zacharias v. Shaughnessy, supra.* That construction is required by the succeeding, antithetical, clause, "*but* as to all such * * * proceedings * * * the statutes repealed" are continued in effect. In other words, under Section 405 of the 1952 Act the appellants were entitled to have the application disposed of under the 1940 Act. And that right was fully accorded them. They were found eligible for suspension under the 1940 Act and the suspension was denied under the discretionary power created by the 1940 Act. The reference to Section 244(a) of the 1950 Act showed only that the Board considered its exercise of discretion to be consonant with the policy of that Act,—not that the scope of its discretionary power was restricted by that Act.

Affirmed.

FRANK, *Circuit Judge* (Dissenting):

When this court, on a petition for rehearing publishes a supplemental opinion which adheres to the previous decision, but on new grounds, the new opinion with its new rationale is invariably and correctly taken, by us and others, as reporting the basis of our decision. I think we must deal similarly with the Board. Accordingly, I think we must look to its second opinion, responsive to the motion for reconsideration, to learn the basis on which the Board refused to exercise its discretion favorably to appellants.

The Board's second opinion is set forth in full in the Appendix hereto. There the Board plainly stated, as follows, that it relied on Section 244(a) of the 1952 Act: "It [fol. 32] is crystal clear that Congress intended to greatly restrict the granting of suspension of deportation by the change of phraseology which was used in Section 244(a) of the Immigration and Nationality Act as well as the Congressional comment at the time this provision was enacted."

Judge Dawson, in dismissing the habeas corpus writ recognized that the Board took "into account the new standard which was laid down by Congress," and held that the Board, in so doing, acted properly.

Here the Board erred. The new statute narrowed the discretion of the Attorney General and thus of his delegate, the Board. Thus the Board did not feel free to exercise the discretion it had under the properly applicable legislation, *i.e.*, the statute as it stood before the 1952 amendment. However, the new Act, as my colleagues concede, had no application to this case. Accordingly, it was precisely as if the Board, without relying on the amended Act, had declared that it would never grant discretionary relief unless deportation would "result in exceptional and extremely unusual hardship to the alien, his spouse, parent or child." Such a restriction by the Board of the breadth of its discretion was arbitrary and therefore illegal.

This case is like *Mastrapasqua* v. *Shaughnessy*, 180 F. 2d 999, 1002-1004 (C. A. 2). There, an Italian seaman, detained in this country during the war, sought the discretionary relief of pre-examination or, in the alternative, suspension of deportation. The Board of Immigration Appeals refused to exercise its discretion because Mastrapasqua was in a class of aliens (those in the United States solely for reasons connected with the war) which the Attorney General, in a prior case, had said should be denied discretionary relief. We held that the Board was not justified in so refusing to exercise its discretion in this class of cases, since the classification was irrational and capricious, and we ordered Mastrapasqua's release from custody unless the [fol. 33] Board, within a reasonable time, exercised its discretion one way or the other, without reliance on any such limitation on its discretion.

My colleagues lean heavily on *U. S. ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489, 491 (C. A. 2) which suggested that the Attorney General's discretionary power to suspend deportation might be analogized to the President's power to pardon a convict. It should be noted that the *Mastrapasqua* case was decided by us less than two weeks after we decided *Kaloudis*. As the two must therefore be read together, it cannot be argued that the earlier decision (*Kaloudis*) over-ruled the later (*Mastrapasqua*) or vice

versa. Moreover, in *Kaloudis,* although we said that there the denial of discretionary relief rested on a ground that was not improper, we indicated that cases might arise where the discretionary power is exercised in disregard of implied limitations. See 180 F. 2d at 490.

Kaloudis did not say that the Board, in exercising its discretion, could apply a standard which Congress specifically said was not to be applied to cases, such as this, which come within the savings clause of Section 405 of the Immigration and Nationality Act of 1952, 66 Stat. 280.[1] In interpreting Section 405 in connection with the application of the pre-1952 test for determining eligibility of an alien for citizenship, the Supreme Court said, in *United States* v. *Menasche,* 348 U. S. 528, 535, "The whole development [fol. 34] of this general savings clause, its predecessors accompanying each of the recent codifications in the field of immigration and naturalization, manifests a well-established congressional policy not to strip aliens of advantages gained under prior laws. The consistent broadening of the savings provision, particularly in its general terminology, indicates that this policy of preservation was intended to apply to matters both within and without the specific contemplation of Congress."

In *United States ex rel. Zacharias* v. *Shaughnessy,* 221 F. 2d 578 (C. A. 2), this court, adopting the liberal view of the savings clause set forth in *Menasche,* held that the eligibility of an alien who came within the clause, for the discretionary relief of voluntary departure, was to be determined under the pre-1952 statute. I think that the same considerations which caused us to so hold in *Zacharias* re-

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[1] Section 405, in part, reads "*Nothing* contained in this Act, unless specifically provided therein, shall be construed to affect any prosecution, suit, action or proceedings, civil or criminal, brought * * * at the time this Act shall take effect; but as to all such * * * proceedings * * *, the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect * * * An application for suspension of deportation under Section 19 of the Immigration Act of 1917, as amended, * * * shall be regarded as a proceeding within the meaning of this subsection." (Emphasis added.)

quire that we now order the Board to exercise its discretion in determining whether to suspend the deportation of petitioners without regard to the new and more severe standard adopted by Congress in the 1952 Act.

[fol. 35] APPENDIX

These cases are before us on counsel's motion to reopen the proceedings for reconsideration of the respondents' application for suspension of deportation.

The male respondent last entered the United States on August 15, 1951 and the female respondent on July 4, 1951. Both arrived as seamen and have been found deportable on the charge that they were immigrants at the time of entry and were not in possession of immigration visas. They have one child who was born in the United States during November 1951. On March 18, 1954, we dismissed the appeals of the respondents from the hearing officer's decision granting voluntary departure and denying suspension of deportation. After considering all the facts in the case at that time, we denied suspension of deportation as a matter of administrative discretion.

Counsel's motion sets forth no matters of which we were unaware at the time our previous decision was rendered. (It is crystal clear that Congress intended to greatly restrict the granting of suspension of deportation by the change of phraseology which was used in Section 244(a) of the Immigration and Nationality Act as well as the Congressional comment at the time this provision was enacted.) We indicated in our previous order that the deportation of the respondents would result in a serious economic detriment to their citizen minor child, and we do not question that the respondents have established the statutory requirements for suspension of deportation under Section 19(c) of the Immigration Act of 1917, as amended.

Counsel argues that the two court decisions cited in our previous order involved grounds for deportation specified in Section 19(d) of the Immigration Act of 1917, as amended. These cases were not within the purview of Section 19(d) although one alien had been convicted of incest [fol. 36] and the other had been a member of the International Workers Order. Weddeke was not deportable be-

cause of his conviction and Kaloudis was not charged with being deportable because of his membership in the International Workers Order. In both cases, the decision of the court was predicated on the fact that, regardless of whether the aliens had established or could establish statutory eligibility, the question of whether suspension of deportation should be granted was entirely discretionary with the Attorney General and his decision was not reviewable by a court unless clearly arbitrary.

Upon our further review of the cases of the two respondents, we adhere to our previous decision that suspension of deportation should be denied as a matter of administrative discretion and counsel's motion will, therefore, be denied.

Order: It is ordered that counsel's motion be and the same is hereby denied.

[fols. 37-47] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

U. S. ex rel. ANASTASIO HINTOPOLOUS and ano., Relator-Appellants,

v.

EDWARD J. SHAUGHNESSY, District Director, etc., Respondent-Appellee

JUDGMENT—May 9, 1956

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

(S.) A. Daniel Fusaro, Clerk.

[fol. 48] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 49] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(2534-6)

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Supreme Court of the United States

October Term, 1955

No. 205

UNITED STATES OF AMERICA, ex rel., ANASTASIOS HINTOPOULOS and ELIZABETH HINTOPOULOS,
Petitioners,

vs.

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization at the Port of New York,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

October Term, 1955

No.

UNITED STATES OF AMERICA, ex rel. ANASTASIOS HINTOPOULOS and ELIZABETH HINTOPOULOS,

Petitioners,

vs.

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization at the Port of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioners respectfully ask this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered May 9, 1956, which judgment affirmed the order of the United States District Court for the Southern District of New York, dated August 1, 1955.

Opinions Below

The opinion of the District Court, Dawson, U. S. D. J., dismissing the writ of habeas corpus herein has been reported in 133 Federal Supplement at page 433, and also appears at page 2a of the record herein. The opinion of the Court of Appeals affirming same has not yet been

reported and appears at page 23a of the record herein. Said District Court opinion and both the majority opinion of Judges Hincks and Waterman and the dissenting opinion of Judge Frank are printed as appendices to this petition.

Statement of Grounds of Jurisdiction

1. The judgment of the Court of Appeals was rendered and entered on May 9, 1956.

2. No application for rehearing was made.

3. The Court of Appeals stayed the issuance of the mandate by order of May 28, 1956 in accordance with its Rule 28(c)(1) and (2).

4. The jurisdiction of this Court is invoked pursuant to 28 U. S. C., Section 1254.

Question Presented for Review

Whether or not the Courts below erred in not holding that it was an improper exercise of discretion, or in effect a total failure to exercise its discretion under the appropriate statute, for the Board of Immigration Appeals to permit its action in a matter solely within the purview of Section 19(c)(2) of the Immigration Act of February 5, 1917, as amended in 1940, to be unduly narrowed and influenced by Congressional Committee Reports made in the course of the enactment of the subsequent Immigration and Nationality Act of June 27, 1952, which, in its Saving Clause, Section 405, expressly provides that said 1917 Act, as amended in 1940, shall solely apply to cases which arose prior to the effective date of said 1952 Act?

Statutes and Rules Relied On

Section 19(c)(2) of the Immigration Act of February 5, 1917, as amended by the Act of June 23, 1940, c. 439, Section 20(c), 8 U. S. C. 155(c)(2), which, so far as here pertinent, provides:

> "(c) In the case of any alien * * * who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may * * * (2) suspend deportation of such alien if he is not ineligible for naturalization, * * * if he finds (a) that such deportation would result in serious economic detriment to a citizen * * * minor child of such deportable alien; * * *."

Section 405(a) of the McCarran Immigration and Nationality Act of June 27, 1952, 8 U. S. C. 1101 note, which, insofar as relevant, provides:

> "(a) Nothing in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any * * * proceeding which shall be valid at the time this Act shall take effect; or to affect any * * * proceedings, civil or criminal, brought, * * * at the time this Act shall take effect; but as to all such * * * proceedings * * * the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * * *An application for suspension of deportation under Section 19 of the Immigration Act of 1917, as amended, * * * which is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection*" (italics supplied).

Statement of the Case

The facts appear in the minutes of immigration hearing at Ellis Island on May 29, 1952, and are contained in file of the Immigration Service which is a part of appellee's return to the writ by reference, Record page 7.

Petitioners are husband and wife, and both are of Greek ethnic origin and nationality. The husband was born June 30, 1913 in Trapesund, Turkey, and was taken to Greece in 1922, when nine years of age, as a Greek repatriate. The wife was born December 28, 1923 in Rostov, Russia and was taken to Greece in November, 1938, when fourteen years of age, as a Greek repatriate.

Both were admitted lawfully to the United States as crew members on the steamship "Panagiotis Koumandaros", the female on July 4, 1951 at Newport News, Virginia, and the male on August 15, 1951 at Baltimore, Maryland, which were their last entries into the United States.

The male had served on vessels for a continuous period of at least fifteen years previously, including the dangerous war period, and on the S. S. "Panagiotis Koumandaros", the vessel on which he last arrived in the United States, for a continuous period of at least three years. He had made at least 30 entries into the United States as a seaman, all in pursuance of his calling, before his last entry upon which the warrants of arrest and deportation herein are predicated. He had at no time previously overstayed his leave and had always departed on the vessel on which he had arrived.

In 1950 petitioners agreed to enter into marriage with each other. However, since the vessel on which the male was employed was not scheduled for an early stop at a Greek port they arranged for the female to meet the male at Casablanca, French Morocco at a time when his ship

was scheduled to be there. As a result they were married in Casablanca on December 6, 1950.

The male had been employed on the S. S. "Panagiotis Koumandaros" since 1948. Desiring his wife to be with him, he arranged for her employment thereon as an assistant steward. From the time of her said employment (December 1950) until her last entry into the United States on July 4, 1951 at Newport News, she was continuously employed on said vessel, had made at least four entries as a seaman into the United States, had always departed with the vessel, and had never overstayed her leave.

During that period of about seven months the female conceived a child. Although pregnant, she continued in her employment on the S. S. "Panagiotis Koumandaros". However, on her fifth trip to the United States she was in her sixth month of pregnaney and became seriously ill. She needed medical attention, and when the vessel arrived at Newport News in July, 1951 she decided to seek medical advice because of her distressed condition. She proceeded to New York by bus and consulted Dr. C. Paul O'Connell at the Harkness Pavilion at the Medical Center on July 23, 1951. His certificate, which is a part of the record, states " * * * that no woman at this stage of pregnancy should undertake ocean voyages, as it places them too far from adequate medical care in the event of an obstetrical emergency".

It was only because of her aggravated condition and the advice of her doctor that a return to her duties on ship would imperil both her life and that of her expected child that she decided to remain ashore until her child was born. This is confirmed by her husband's action—he did not leave the ship with his wife. To the contrary, he continued his employment and departed with the vessel in the hope that upon the next arrival of his ship in the United States his wife would be in condition to rejoin him. His

next arrival was at Baltimore, Maryland on August 15, 1951 and he went ashore with the intention of reshipping. It was only after he saw his wife, learned the seriousness of her condition, and heard her pleas that he remain with her until the birth of their child, since they had neither relatives nor friends in the United States, that he decided to remain ashore with her.

Only after their child was born on November 11, 1951 did they conceive the hope that they could remain in the United States to give their child the educational, spiritual and material benefits available to him here but not in Greece, where economic conditions have been so bad for years as to necessitate the enactment by our Congress, successively, of the Displaced Persons Act and the present Refugee Relief Act to relieve that greatly overcrowded and distressed country, and others similarly situated.

During the four years which have elapsed since their entries in the summer of 1951, they have been wholly self-supporting, have established a comfortable home for themselves and their American citizen child, have been law-abiding, and in every way have comported themselves as good members of the community in which they have lived.

On January 4, 1952, less than two months after the birth of their child, they voluntarily disclosed their presence in the United States and made and filed with the New York office of the Immigration Service formal applications for suspension of deportation pursuant to the provisions of Section 19(c)(2) of the Immigration Act of February 5, 1917 (8 U. S. C. 155(c)(2)), which provides:

> "(c) In the case of any alien * * * who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may * * * (2) suspend deportation of such alien * * * if he finds (a) that such deportation would result in

serious economic detriment to a citizen or legally resident alien who is the * * * minor child of such deportable alien; * * *."

Thereafter on April 9, 1952 warrants of arrest in deportation proceedings issued against both, and on May 29, 1952 they were accorded a hearing thereunder at Ellis Island.

At the conclusion of said hearing of May 29, 1952 at Ellis Island, the Hearing Officer made a decision, App. 8a, in which he stated:

"Both respondents have applied for suspension of deportation on the ground of the economic detriment that would befall their minor son in the event they were deported. They have asked in the alternative for voluntary departure in lieu of deportation. Both disclaim having a criminal record anywhere and both allege that they have been persons of good moral character. Evidence of record would tend to corroborate their testimony in this respect. Their only income is from the employment of the male respondent on two jobs, the one as a salesman and the other as a superintendent of the apartment house in which they live. His combined income amounts to approximately $64.00 a week. Their joint assets consist of savings in the sum of about $500.00 and their furniture and other personal property which they value at $1500.00. While it would seem that their son, who was born in New York City in November 1951 would suffer economically if his parents should be deported, it is not believed that as a matter of administrative discretion the respondents' applications for suspension of deportation should be granted. They have been in the United States for a period of less than one year. They have no relatives in this country other than each other and their son. To grant both this form of relief upon the

accident of birth in the United States of their son would be to deprive others who are patiently awaiting visas under their already oversubscribed quotas."

He assigned no other reason whatsoever for the denial of suspension of deportation and failed to mention that such "accident of birth" made the child a citizen of the United States under the Constitution. His last quoted sentence is at utter variance with the true facts because, in enacting Subsection (c) of 8 U. S. C. 155, Congress very carefully provided that in cases wherein suspension of deportation was granted, the deportation proceedings should be cancelled, and that:

> "Upon the cancellation of such proceedings in any case in which fee has been paid the Commissioner shall record the alien's admission for permanent residence as of the date of his last entry into the United States and the Secretary of State shall, if the alien was a quota immigrant at the time of entry and was not charged to the appropriate quota, reduce by one the immigration quota of the country of the alien's nationality as defined in section 212 of this title, for the fiscal year then current at the time of cancellation or the next following year in which a quota is available: Provided, *that no quota shall be reduced by more than 50 per centum in any fiscal year.*"

At the conclusion of said hearing, both appellants appealed to the Board of Immigration Appeals from said decision. The Board heard said appeals on January 23, 1953, and on March 18, 1954 made a decision denying suspension of deportation and dismissing the appeals, App. 13a, wherein it stated:

> "It is obvious that the American citizen infant child is dependent upon the alien parents for economic sup-

port, care and maintenance. Documentary and other evidence establish good moral character for the requisite period. The aliens have no connection with subversive groups." • • •

"Notwithstanding the fact that the family situation in the case before us is similar to the situation in the case last referred to by counsel, in which a decision was made in 1951; and notwithstanding the fact that the deportation of these respondents would result in a serious economic detriment to an American citizen infant child, the granting or withholding of maximum discretionary relief depends on the factors and merits in each individual case, and is a matter of administrative discretion. We have carefully examined the facts and circumstances in the instant case and we find that the granting of the maximum relief is not warranted by the record in the case. The appeals will be dismissed."

The irony of the situation becomes apparent when it is noted that, in support of the proposition that the granting or withholding of the privilege of suspension of deportation is a matter of administrative discretion, the Board cites two cases, *Weddeke* v. *Watkins,* 166 F. 2d 369; and *Kaloudis* v. *Shaughnessy,* 180 F. 2d 489. In each of these cases the manner in which the discretionary power was exercised was controlled by a fact inherent in the case and appearing in the record—Weddeke had been convicted of Incest upon an infant child, and Kaloudis had been a member of the International Workers Order, a red organization. In the instant case, as stated by both the Hearing Officer and the Board, the petitioners are and always have been persons of good moral character, and the record does not contain a single word of evidence to the contrary.

As neither the Hearing Officer's said decision nor the Board's said decision assigned any reason for same, and

as they were totally unsupported by any evidence adduced at the hearing, a motion was made before the Board of Immigration Appeals to reopen and reconsider the matter, and on May 5, 1954 the Board made a decision, App. 17a, in which it stated:

> "Counsel's motion sets forth no matters of which we were unaware at the time our previous decision was rendered. *It is crystal clear that Congress intended to greatly restrict the granting of suspension of deportation by the change of phraseology which was used in Section 244(a) of the Immigration and Nationality Act as well as the Congressional comment at the time this provision was enacted* (June 27, 1952). We indicated in our previous order that the deportation of the respondents would result in a serious economic detriment to their citizen minor child, and we do not question that the respondents have established the statutory requirements for suspension of deportation under Section 19(c) of the Immigration Act of 1917, as amended."

Here, for the first time, the real reason for the Board's action appears. Instead of considering and deciding the case solely under the provisions of Section 19(c) of the Immigration Act of 1917, as amended, 8 U. S. C. 155(c), the Board erroneously based its decision upon what it believed was the intent of Congress in enacting the subsequent McCarran Immigration and Nationality Act of June 27, 1952 which, by the express provisions of its savings clause, Section 405(a), 8 U. S. C. 1101, note, provides that the provisions of the 1917 Act shall solely apply to applications for suspension of deportation pending prior to June 27, 1952.

Jurisdiction of the Courts Below

The District Court had jurisdiction herein under 28 U. S. C. 1651. The Court of Appeals had jurisdiction under 28 U. S. C. 1291.

Reasons for Allowance of the Writ

The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. The majority opinion herein cites no decision of this Court in support thereof.

The majority opinion of the Court of Appeals herein is in conflict with that Court's previous decisions in *Mastrapasqua* v. *Shaughnessy,* 180 F. 2d, 999-1004, and *Zacharias* v. *Shaughnessy,* 221 F. 2d 578, and, by implication, the decision of this Honorable Court in *U. S.* v. *Menasche,* 348 U. S. 528, 535, as indicated by Judge Frank in his dissenting opinion herein.

POINT I

Petitioners have been denied due process of law, and the decision is not supported by the evidence.

On July 14, 1955, petitioners instituted the present habeas corpus proceeding, which the District Court below, Honorable Archie O. Dawson, U. S. D. J., dismissed on August 1, 1955 with an opinion, App. 2a, in which he stated:

> "Prior to the final determination of this matter by the Board of Immigration Appeals, Congress had enacted the Immigration and Nationality Act, of 1952. Under the 1917 Act, as amended, the applicant for suspension of deportation had to show 'serious economic detriment.' Under the 1952 Act, the appli-

cant would have to show that the deportation would 'result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child,' 8 U. S. C. Sec. 1254(a)(1).

In the consideration of the 1952 Act in Congress, this change in the test to be applied to suspension of deportation was considered. The Senate Judiciary Committee, in its report on the Bill which subsequently became law, said:

> 'The bill accordingly establishes a policy that the administrative remedy should be available only in the very limited category of cases in which the deportation of the alien would be unconscionable. Hardship or even unusual hardship to the alien or to his spouse, parent, or child is not sufficient to justify suspension of deportation.' • • •.

The Attorney General, in exercising his discretion, could take into account the new standard which was laid down by Congress. The new standard was referred to in the decision of the Board of Immigration Appeals of May 5, 1954."

This is error. In his dissenting opinion herein Judge Frank stated:

> "Judge Dawson, in dismissing the habeas corpus writ recognized that the Board took 'into account the new standard which was laid down by Congress,' and held that the Board, in so doing, acted properly.
>
> Here the Board erred. The new statute narrowed the discretion of the Attorney General and thus of his delegate, the Board. Thus the Board did not feel free to exercise the discretion it had under the properly applicable legislation, i. e., the statute as it stood before the 1952 amendment. However,

> the new Act, as my colleagues concede, had no application to this case. Accordingly, it was precisely as if the Board, without relying on the amended Act, had declared that it would never grant discretionary relief unless deportation would 'result in exceptional and extremely unusual hardship to the alien, his spouse, parent or child.' Such a restriction by the Board of the breadth of its discretion was arbitrary and therefore illegal."

At the bottoms of pages 5 and 6 of his opinion, Judge Dawson quotes from a report made by the Senate Judiciary Committee prior to the enactment of said inapplicable 1952 Act, to support the foregoing erroneous conclusion. However, if it is at all necessary to examine the intent of Congress herein, it should be done with regard to that of the 76th Congress which enacted the Alien Registration Act of 1940, which amended said Section 19 of the Act of 1917 by adding thereto Subsection (c), the applicable provision of law in the instant case, as continued in force by said Section 405(a) of the McCarran Immigration and Nationality Act of June 27, 1952, 8 U. S. C. 1101 Note.

House Report No. 2683 of the Conference Committee dated June 21, 1940 to accompany H. R. 5138, to amend Section 19 of the Act of February 5, 1917 by adding Subsections (c) and (d) thereto, states at page 9:

> "Subsection (c) provides that certain cases, generally those in which aliens are deportable solely because of illegal entry, the Attorney General may allow aliens to depart at their own expense, or may, subject to congressional review, *suspend orders of deportation where deportation would result in unwarranted hardship.*"

On the basis of that Conference Report the Senate and House enacted said amendment, and on June 28, 1940 the

President approved same, which, insofar as relevant to the instant case, reads as follows:

> "(c) In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who proved good moral character for the preceding five years, the Attorney General may * * * suspend deportation of such alien * * * if he finds that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien."

The very language indicates that its purpose was and is to protect the American citizen or legally resident alien dependent on the deportable alien, and not such deportable alien. It remained unchanged during the ensuing 12 years until June 27, 1952, when the McCarran Act was enacted, and continued it in force as to cases pending on June 27, 1952.

That the Board of Immigration Appeals has so construed it is clear from its numerous decisions thereunder.

On July 21, 1944, file 56111/780, the Board ruled to the effect that serious economic detriment exists if the effect of deportation of the applicant would be substantially to lower the standard of living of the dependent relative.

On May 15, 1943, file 56050/380, it ruled to the effect that when an alien has property worth $300 and takes care of her home and looks after the needs of her two American-born minor children, deportation would work serious economic detriment to the children, although the family receives $62.50 of public funds monthly for its maintenance.

On March 13, 1943, file 55834/444, it ruled to the effect that when an alien minor child is dependent on her United

States citizen mother whose income is $30 per month, deportation of the child would result in serious economic detriment to the mother, for the mother then would be required to maintain two households from her income.

On March 30, 1943, file 56093/577, it ruled to the effect that the fact that an alien does not earn sufficient income to support his relatives, who must rely on public funds for the remainder of their maintenance, is not sufficient to deny favorable consideration of his application for suspension of deportation, as to deport him would cause the loss of whatever income he does earn and increases the burden upon relief authorities.

On March 31, 1943, file 55930/335, it ruled to the effect that an alien woman, who lives with and is completely occupied in the upbringing of her minor native-born citizen children, the family being supported by public relief funds in the absence of her husband, is performing services of economic value and her deportation would result in a serious economic detriment to her minor children.

In *In re Emilio Consigliero,* A-2146468, decided by the Board on October 9, 1947, suspension of deportation had been denied by both the Hearing Officer and the Central Office because of certain acts on the part of the respondent, and in reversing the decision below the Board stated:

> "And in this connection we must remember that *we are not concerned with the respondent as an individual but as a head of an American family.*"

The case of *Mariangoula T. Tsolainos,* A-6250408, decided by the Board on November 25, 1949, is directly in point. That case involved a Greek citizen who was admitted as a visitor for six months. One month after her arrival she married a Greek citizen, then illegally in the United States. A male child was born of that union. The mother applied for suspension of deportation. The Central Office

denied the application. The Board of Immigration Appeals reversed and granted suspension, adopting the view of counsel that:

> "As a matter of ordinary common sense, no one could possibly take the position that the loss of a two year old's mother would not be a serious detriment to the child because no amount of nurses, governesses and pediatricians could take the place in this or any child's life of the love and care of his mother. On the other hand, if the child were to be taken to Europe he would be forced to suffer the detriment of being brought up in a foreign land * * *.
>
> This Board has given careful consideration to all the evidence of record, as well as all of the representations of counsel, and to the decision of the Assistant Commissioner of Immigration and Naturalization, and it is our conclusion that to enforce the departure of this appellant from the United States would in our opinion result in a serious economic detriment to this minor United States born child, particularly in the light of the condition of the quota of Greece, as well as the present chaotic conditions abroad, particularly in the country of the alien's nativity * * *."

In each of the above cases the aim was to avoid depriving the citizen dependent of the support of the deportable alien, no matter how meager the contribution might be. The citizen dependent's welfare, not that of the deportable alien, was and is the prime consideration, and each of said cases carried out the purpose and intent of the statute.

On December 24, 1952 his Honor, Judge Bondy, rendered an opinion in *Avgerinos* v. *Shaughnessy,* Civ. 79-104, in which he stated:

> "* * * The relator does not question his deportability. The sole question is whether suspension

may be denied as a matter of discretion without disclosing the evidence on which the denial is based and without even disclosing the conclusion drawn from the undisclosed confidential information. • • •

The District Court for the District of Columbia held in *Alexiou* v. *McGrath*, 101 F. Supp. 421 that although denial of relief is discretionary, nevertheless after the Attorney General had promulgated regulations establishing a procedure assuring a fair hearing on the issue of discretionary relief such procedure must be followed and that consideration of the confidential evidence without the disclosure thereof was error. See *U. S. ex rel. Salvetti* v. *Reimer*, 103 F. (2d) 777, 779; *U. S. ex rel. Weddecke* v. *Watkins*, 166 F. (2d) 369, 371; and the decision by this court in *U. S. ex rel. Bauer* v. *Shaughnessy*, Civ. 50-217 U. S. D. C., S. D. N. Y., July 28, 1949."

The petitioners herein are aliens who have entered the United States and they are entitled to due process of law, as was held by the Supreme Court in *Shaughnessy, District Director* v. *U. S. ex rel. Mezei*, 73 S. Ct. 625, in which, at page 629, it stated:

"(3-6) It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. *The Japanese Immigrant Case* (*Karou Yanataya* v. *Fisher*), 1903, 189 U. S. 86, 100-101, 23 S. Ct. 611, 614, 47 L. Ed. 721; *Wong Yang Sung* v. *McGrath*, 1950, 339 U. S. 33, 49-50, 70 S. Ct. 445, 453-454, 94 L. Ed. 616; *Kwong Hai Chew* v. *Colding*, 1953, 344 U. S. 590, 598, 73 S. Ct. 472, 478."

In the *Avgerinos* case, *supra*, Judge Bondy defines "due process of law", as applicable to cases such as the instant one, in the following language:

> "The regulations in effect at the time of the Board's decision, and still in effect, provide that: the hearing officer may at such time, as he deems appropriate, advise the alien of his right to apply for discretionary relief, 151.2(c); the alien may at any time during the hearing under the warrant apply for one or more forms of discretionary relief from deportation, 151.3(e). The hearing officer shall present at the hearing 'all available evidence concerning factors bearing upon statutory eligibility for discretionary relief', 151.2(c)(4), and such other information as may be pertinent to the issue of the case, 151.2(c)(5); the alien has a right to the presence of his counsel, and he or the counsel 'shall be permitted to offer evidence to meet any evidence adduced against the alien and to cross-examine witnesses.' 151.2(g); in addition he may submit any written or oral material which he believes should be considered in the exercise of discretion, 151.3(e); as soon as practicable after the hearing the hearing officer shall make 'a decision which shall set forth a summary of the evidence adduced and his findings of fact and conclusions of law as to deportability; if the alien has applied for discretionary relief . . . the decision shall also contain a discussion of the evidence relating to the alien's eligibility for such relief and the reasons for granting or denying such an application', 151.5(a); the decision shall be concluded with an order that the alien be deported, proceedings terminated or that discretionary relief be granted, 151.5(a)(c). Lastly, 151.2(b) expressly provides 'The hearing officer shall conduct a fair and impartial hearing.' (Part 151 as amended in 17 F. R. 4740, 4741.)

> These regulations clearly establish that they were enacted in order to assure a fair hearing as a basis for the exercise of discretion conferred upon the Attorney General. The regulations have the force of law and must be followed. *Bilokumsky* v. *Tod*, 263 U. S. 149, 155; *Bridges* v. *Wilson*, 326 U. S. 135; 153. See *U. S. ex rel. Salvetti* v. *Reimer*, supra; *U. S. ex rel. Weddecke* v. *Watkins*, supra.
>
> The hearing officer is required to present such information as may be pertinent to the issue of the case. If the exercise of discretion is based upon confidential evidence without disclosing even the ultimate conclusion drawn from that evidence, then the alien's right to refute any evidence adduced against him would be impaired and the alien's right to submit 'any written or oral material which he believes should be considered in the exercise' of the Attorney General's discretion likewise would be of little use. As the Board of Immigration Appeals and the District Court of the District of Columbia in the Alexiou case decided, the use of confidential evidence without any disclosure of its purport was contrary to the regulations and violated the rights of the relator. Had the disclosure been made the relator may have been able to introduce evidence disproving the truth of such information."

Most certainly the procedure in the case at bar does not meet requirements of the regulations so carefully enumerated in Judge Bondy's above quoted decision. The hearing officer and the Board both found that both petitioners were statutorily eligible for suspension of deportation, but, in denying same, failed utterly to assign any reason based upon the evidence adduced at the hearing, or otherwise, for such denial.

Therefore, petitioners were denied due process of law.

POINT II

The Attorney General's arbitrary exercise of discretion, or failure to exercise discretion under the applicable statute, is subject to judicial review.

In the return to the writ of habeas corpus herein, respondent stated in paragraph 15:

> "The denial by the Board of Immigration Appeals of the discretionary privilege of suspension of deportation, in the circumstances of these cases, is not subject to judicial review. (See *Kaloudis* v. *Shaughnessy*, 180 F. 2nd 489.) The granting of a joint executive and legislative 'pardon' from deportation is a matter of grace and is a discretionary matter wherein the courts may not intervene." (See also: *U. S. ex rel. Bartsch* v. *District Director*, 175 F. 2d 245; *U. S. ex rel. Ciannamea* v. *Neelly*, 202 F. 2d 289; *U. S. ex rel. Adel* v. *Shaughnessy*, 183 F. 2d 371; *U. S. ex rel. James* v. *Shaughnessy*, 202 F. 2d 519; *cert. denied* 345 U. S. 969; *U. S. ex rel. Matrauga* v. *Mackay*, 210 F. 2d 160, *cert. denied* 347 U. S. 967.)

However, an examination of the cited cases will show that in every one of them there was evidence adduced at the hearings which fully justified the manner in which the discretionary power was exercised against the alien's contention. No such evidence was adduced in the immigration proceedings in the case at bar.

Further, in 1950 the Court below held in *Mastrapasqua* v. *Shaughnessy*, C. A. N. Y. 1950, 180 F. 2d 999, that where Board of Immigration Appeals refused to exercise general discretionary power to grant deportable aliens a pre-examination as to right of re-entry or suspension of deportation, on sole ground that Italian applicant was an

alien whose presence within the United States was due solely to World War II, and that the Attorney General had decided without explanation that no discretionary relief should be accorded such persons, classification was capricious, and alien was entitled to release in habeas corpus proceeding unless within reasonable time set by the District Court discretion was exercised.

In 1953 the United States District Court for the District of Columbia, in *U. S. ex rel. Athanasopoulos* v. *Reid,* 110 F. Supp. 200, held that although Attorney General was vested with sole discretion to permit voluntary departure of aliens in lieu of deportation in situations specified by former Section 155 of Title 8, omissions from record and exclusion by hearing officer of competent evidence constituted an infringement of law in that reviewing authority had no basis upon which to exercise discretion.

The two last cited decisions are in accord with a long line of decisions running back through the last century, and they, together with Judge Bondy's said decision of December 24, 1952, Civil 79-104, in *Avgerinos* v. *Shaughnessy, supra,* and that of the District Court for the District of Columbia in *Alexiou* v. *McGrath,* 101 F. Supp. 421 (1951), *supra,* completely nullify the above-quoted contention of the respondent herein.

In the instant case there has been a total failure to properly exercise discretion, and no evidence was adduced at the immigration hearing to support the erroneous decision herein.

CONCLUSION

It is respectfully submitted that the various questions raised are of such importance in the administration of Federal Law that there should be an authoritative determination of same by this Court. Accordingly, petitioners ask that this Court issue a writ to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

EDWARD L. P. O'CONNOR,
Attorney for Petitioners,
135 Broadway,
New York, N. Y.

JAY NICHOLAS LONG,
of Counsel.

Appendix A

(Opinion of District Court)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Appearances:

JAY NICHOLAS LONG, of New York, N. Y., Attorney for Relators.

LLOYD F. MACMAHON, United States Attorney for the Southern District of New York, Attorney for Respondent; LESTER FRIEDMAN, Attorney in the Office of the District Counsel, Immigration and Naturalization Service, Department of Justice, of Counsel.

DAWSON, *D. J.*:

This matter, brought up by the issuance of a writ of habeas corpus, involves the question as to whether the denial to petitioners of suspension of deportation by the Attorney General was an abuse of discretion by the Attorney General.

The undisputed facts show that the relators are citizens of Greece who are now illegally in the United States. They last entered the United States in 1951 as members of a crew of a Greek steamship. They were granted shore leave for the period of time the vessel on which they arrived remained in port, but in no event to exceed twenty-nine days. They failed to depart from the United States before

the expiration of their period of temporary admission and did not apply for any extension of this period.

In April, 1952, warrants of arrest were duly issued by the District Director of Immigration and Naturalization charging that the relators were unlawfully in the United States and subject to deportation. A hearing was accorded to the relators. The Hearing Officer made his decision, finding both relators deportable and denying their applications for suspension of deportation. An appeal was taken to the Board of Immigration Appeals, and that Board, on March 18, 1954, made an order denying their applications for suspension of deportation and dismissing their appeal. They were given permission to depart voluntarily from the United States.

Relators did not depart from the United States, but on April 19, 1954, filed a motion addressed to the Board of Immigration Appeals requesting that the proceedings be re-opened and their applications for suspension of deportation reconsidered. On May 5, 1954, the Board of Immigration Appeals denied relators' motion. They were given until August 20, 1954 within which to avail themselves of the privilege of voluntary departure. On May 11, 1955, they submitted another motion addressed to the Board of Immigration Appeals asking that the administrative proceedings be re-opened and their application for suspension of deportation reconsidered. These motions were denied by the Board of Immigration Appeals on June 3, 1955.

On July 12, 1955, relators submitted an application that their deportation be stayed on the ground that the deportation could possibly endanger the life of the relator Elizabeth Hintopoulos and would involve "the possible loss of the unborn child with whom she is now in the fifth month of pregnancy". On July 13, 1955, this relator was examined by a surgeon of the United States Public Health Serv-

ice who certified that she was able to travel without danger to life; that she required no immediate medical treatment, and that she could travel aboard a vessel having a physician aboard. Thereupon, relators' application for a stay of deportation was denied and they were taken into custody for deportation.

Relators do not deny that they are illegally in the Country and are subject to deportation. They urge, however, that they were eligible for suspension of deportation under the provisions of § 19(c) of the Immigration Act of 1917, as amended, and that the refusal of the Attorney General to suspend deportation under the provisions of this statute was an abuse of discretion.

The respondent admits that relators came within the category of the persons for whom the Attorney General might suspend deportation. Respondent urges, however, that the suspension of deportation under the provisions of this statute is purely a matter of the discretion of the Attorney General; that the Attorney General exercised his discretion and did not exercise it capriciously or arbitrarily.

It is well established that the Courts may not review the exercise of such discretion by the Attorney General, and that they may interfere only where there has been a clear abuse of discretion or a clear failure to exercise discretion. In such cases, the Court can do no more than to require that the discretion be properly exercised. *United States ex rel. Kaloudis* v. *Shaughnessy* (C. A. 2, 1950), 180 F. 2d 489; *United States ex rel. Adel* v. *Shaughnessy* (C. A. 2, 1950), 183 F. 2d 371; *United States ex rel. James* v. *Shaughnessy* (C. A. 2, 1953), 202 F. 2d 519, cert. den. 345 U. S. 969.

The administrative record which was submitted in connection with this proceeding shows that the Board of Immi-

gration Appeals recognized that relators had established the statutory requirements for discretionary suspension of deportation under § 19(c) of the Immigration Act of 1917, as amended, and that the Board recognized that the deportation of relators might result in "serious economic detriment" to their citizen minor child. After considering these matters, however, the Board denied the suspension of deportation as a matter of administrative discretion.

Prior to the final determination of this matter by the Board of Immigration Appeals, Congress had enacted the Immigration and Nationality Act, of 1952. Under the 1917 Act, as amended, the application for suspension of deportation had to show "serious economic detriment". Under the 1952 Act, the applicant would have to show that the deportation would "result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child", 8 U. S. C. § 1254(a)(1).

In the consideration of the 1952 Act in Congress, this change in the test to be applied to suspension of deportation was considered. The Senate Judiciary Committee, in its report on the Bill which subsequently became law, said:

> "The bill accordingly establishes a policy that the administrative remedy should be available only in the very limited category of cases in which the deportation of the alien would be unconscionable. Hardship or even unusual hardship to the alien or to his spouse, parent, or child is not sufficient to justify suspension of deportation." *

---

* The Senate Judiciary Committee stated in Senate report No. 1137, with reference to the Bill which subsequently became law, as follows:

> "The term 'exceptional and extremely unusual hardship' requires some explanation. The committee is aware that in almost all cases of deportation, hardship and frequently unusual

Appendix A

The Attorney General, in exercising his discretion, could take into account the new standard which was laid down by Congress. The new standard was referred to in the decision of the Board of Immigration Appeals of May 5, 1954. The Board in that opinion recognized that the deportation might result in "serious economic detriment to the American-born infant child", but concluded that this was not alone enough to warrant suspension of deportation. The Board pointed out that the child at the time of the decision in 1954 was about two and one-half years old;

---

hardship is experienced by the alien or the members of his family who may be separated from the alien. The committee is aware, too, of the progressively increasing number of cases in which aliens are deliberately flouting our immigration laws by the processes of gaining admission into the United States illegally or ostensibly as non-immigrants but with the intention of establishing themselves in a situation in which they may subsequently have access to some administrative remedy to adjust their status to that of permanent residents. The practice is grossly unfair to aliens who await their turns on the quota waiting lists and who are deprived of their quota numbers in favor of aliens who indulge in the practice. This practice is threatening our entire immigration system and the incentive for the practice must be removed. Accordingly, under the bill, to justify the suspension of deportation the hardship must not only be unusual but must also be exceptionally and extremely unusual. The bill accordingly establishes a policy that the administrative remedy should be available only in the very limited category of cases in which the deportation of the alien would be unconscionable. Hardship or even unusual hardship to the alien or to his spouse, parent, or child is not sufficient to justify suspension of deportation. To continue in the pattern existing under the present law is to make a mockery of our immigration system." (Quoted in "Commentary on the Immigration and Nationality Act" by Walter M. Besterman, Legislative Assistant, Committee on the Judiciaries, House of Representatives, Vol. 8 U. S. C. p. 67.)

that the parents had been in the United States for a period of less than three years; that both had arrived in this Country as seamen; that they have no other dependents or close family ties here, and the male relator may be able to obtain work as a Greek seaman and earn about $85. per month.

Under the circumstances, it appears clear that the Board of Immigration Appeals, acting for and on behalf of the Attorney General, exercised its discretion; that it did not capriciously exercise its discretion or abuse its discretion. Under the circumstances, this Court has no power to review this exercise of discretion by the Attorney General.

The writ of habeas corpus is dismissed. So ordered.

Dated: New York, N. Y., August 1, 1955.

ARCHIE DAWSON,
U. S. D. J.

Appendix B

(Opinion of United States Court of Appeals, For the Second Circuit)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 144—October Term, 1955.

(Argued October 10, 1955 Decided May 9, 1956.)

Docket No. 23809

UNITED STATES OF AMERICA, *ex rel.* ANASTASIOS HINTOPOULOS and ELIZABETH HINTOPOULOS,
Relators-Appellants,

against

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization at the Port of New York,
Respondent-Appellee.

Before:

FRANK, HINCKS and WATERMAN,
Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Archie O. Dawson, *Judge*, dismissing a writ of habeas corpus. Affirmed.

JAY NICHOLAS LONG, New York, N. Y., for Relators-Appellants.

Appendix B

TERESA S. REARDON, Asst. U. S. Atty., S. D. N. Y. (Paul W. Williams, U. S. Attorney, S. D. N. Y.; Roy Babitt, Attorney, Immigration and Naturalization Service, on the brief), for Respondent-Appellee.

HINCKS, *Circuit Judge*:

This appeal from an order dismissing a writ of habeas corpus turns upon the validity of an order of the Board of Immigration Appeals denying the appellants' request for suspension of deportation.

The facts are substantially as follows. The appellants are husband and wife, both Greek citizens. Both were admitted to the United States as seamen, the wife at Newport News, Virginia, on July 4, 1951 and the husband at Baltimore, Maryland, on August 15, 1951. At the time the female entered the United States she was six months pregnant and journeyed to New York to seek medical advice where her husband joined her at the later date when his ship next arrived in the United States. Their child was born in the United States on November 11, 1951 and thus by reason of his nativity is an American citizen. On January 4, 1952, the appellants voluntarily disclosed their illegal presence and made application to the Immigration Service for suspension of deportation. On April 9, 1952, warrants issued for their arrest in deportation proceedings, and on May 29, 1952 they were accorded a hearing thereunder at Ellis Island. The Hearing Officer found them deportable for entry into the United States with intent to remain indefinitely without possession of immigration visas, and denied their application for suspension of deportation. The Board of Immigration Appeals affirmed the decision of the Hearing Officer in an opinion dated March 18, 1954. On May 5, 1954, the Board reiterated its conclusion in denying a motion to

reopen the proceedings. Thereafter, the appellants were taken into custody for deportation and a writ of habeas corpus was issued on July 14, 1955. On August 1, 1955, the United States District Court for the Southern District of New York, per Dawson, *J.*, dismissed the writ and upheld the decision of the Board as a proper exercise of the Attorney General's discretionary power to grant or deny the relief requested. The present appeal is prosecuted from the dismissal of the writ below.

On this appeal, as below, the appellants do not question their deportability. Their attack on the administrative order is confined to so much thereof as denied their request for suspension of deportation. As to this the applicable statute is the Immigration and Nationalty Act of June 23, 1940, c. 439, § 20(c) (which amended 39 Stat. 889) which, so far as here pertinent, provides:

> "In the case of any alien * * * who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may suspend deportation of such alien * * * if he finds that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the * * * minor child of such deportable alien."

It is clear that under this statute the "good moral character" of the appellants for five years and resultant "serious economic detriment [to] their minor child" were essential qualifications for the eligibility of these appellants for suspension of their deportation. In the administrative proceedings it was found that both these qualifications existed and that the appellants were indeed eligible. Notwithstanding, the Attorney General, through the Board of Immigration Appeals as his administrative delegate, in the

exercise of the discretion vested in him by the Act, refused to grant a suspension.

To determine the validity of that action we look first to the opinion of the Board of Immigration Appeals of March 18, 1954. In that opinion, its Board took note of the financial condition of the appellants and went on to say:

> "• • • It is obvious that the American citizen infant child is dependent upon the alien parents for economic support, care and maintenance. Documentary and other evidence established good moral character for the requisite period. The aliens have no connection with subversive groups."

It concluded its opinion with these two paragraphs:

> "As stated above, we have, in the instant case, a family consisting of two alien parents illegally residing in the United States and one American citizen child, age about two and one-half years. These respondents have been in the United States for a period of less than three years. Both arrived in this country as seamen. They have no other dependents or close family ties here. The record indicates that the male respondent may be able to obtain work as a Greek seaman and earn about $85 monthly.
>
> "Notwithstanding the fact that the family situation in the case before us is similar to the situation in the case last referred to by counsel, in which a decision was made in 1951; and notwithstanding the fact that the deportation of these respondents would result *in a serious economic detriment to an American citizen infant child,* the granting or withholding of maximum discretionary relief depends on the factors and merits in each individual case, and is a

matter of administrative discretion.[1] We have carefully examined the facts and circumstances in the instant case and we find that the granting of the maximum relief is not warranted by the record in the case. The appeals will be dismissed.

* * *

The emphasis which we have added to the second paragraph just quoted shows unmistakably that the Board recognized that the applicable hardship test of eligibility was "a serious economic detriment to an American citizen," which was the precise test of eligibility for suspension provided in the applicable statute from which we quote above. On that basis, it found that the appellants were in all respects eligible for suspension. But in the belief that the exercise of its discretion under the statute "depends on the factors and events in each individual case" the Board denied suspension as "not warranted by the record in this case."

We see nothing in the opinion, or indeed in the underlying record, to suggest that the determination was arbitrary or based on irrelevant or improper considerations. We cannot say as a matter of law that if, as a result of the parents' deportation, the minor child shall be reared, say, in Athens instead of in Brooklyn, that the resulting economic detriment to the child—which was recognized—is a factor of sufficient gravity to withhold the deportation of aliens who had entered this country with intent to remain indefinitely, in violation of the immigration laws, less than a year before the decision of the Hearing Officer which first ordered their deportation. We conclude that under our former decisions which the Board cited in its March 18th opinion—*Weddeke* and *Kaloudis*—the Board's action would

---

"[1] *Weddeke* v. *Watkins*, 166 F. 2d 369; and *Kaloudis* v. *Shaughnessy*, 180 F. 2d 489."

have been unassailable if the administrative proceedings had stopped there. That conclusion is further supported by *United States, ex rel. James* v. *Shaughnessy*, 2 Cir., 202 F. 2d 519; *United States, ex rel. Adel* v. *Shaughnessy*, 2 Cir., 183 F. 2d 371; *United States, ex rel. Sleddens* v. *Shaughnessy*, 2 Cir., 177 F. 2d 363.

But thereafter the appellants made a motion to reopen the proceedings for reconsideration of the prior applications for suspension. This motion the Board denied with a short opinion dated May 5, 1954. In that opinion, it said:

> "Counsel's motion sets forth no matters of which we were unaware at the time our previous decision was rendered. It is crystal clear that Congress intended to greatly restrict the granting of suspension of deportation by the change of phraseology which was used in Section 244(a) of the Immigration and Nationality Act as well as the Congressional comment at the time this provision was enacted. We indicated in our previous order that the deportation of the respondents would result in a serious economic detriment to their citizen minor child, and we do not question that the respondents have established the statutory requirements for suspension of deportation under Section 19(c) of the Immigration Act of 1917, as amended."
>
> • • •
>
> "Upon our further review of the cases of the two respondents, we adhere to our previous decision that suspension of deportation should be denied as a matter of administrative discretion and counsel's motion will, therefore, be denied."

By these two paragraphs the Board made it abundantly clear that it adhered to its previous holding that the ap-

pellants' eligibility for a suspension was controlled by the 1940 Act; that under that Act the appellants were indeed eligible; and that *in the exercise of its discretion* it denied the suspension applied for. Having thus stated that its decision was made in the exercise of its discretion, we see no room whatever for the argument that the Board had failed or refused to exercise its discretion. In this respect, the case here is distinguishable from *Mastrapasqua* v. *Shaughnessy*, 2 Cir., 180 F. 2d 999, in which the Board had refused to exercise its discretion. And since the Board found the appellants eligible for a suspension under the eligibility standard of the 1940 Act, its decision was not in conflict with our decision in *United States ex rel. Zacharias* v. *Shaughnessy*, 221 F. 2d 578.

The only remaining question is whether in its May opinion the reference to Section 244(a) of the Immigration and Nationality Act of 1952 indicates that in the formulation of its discretion the Board was improperly influenced by Congressional policy as manifested by the later Act. As to this, it will be noted that neither the 1940 Act nor the 1952 Act provide any indication of the factors which shall control the formulation of the discretion granted: under each, once the respective eligibility requirements are found to exist—as they were here—the Board has untrammeled discretion to grant or withhold a suspension. Only if the discretion is shown to have been formulated on arbitrary or illegal considerations may the courts interfere. *United States ex rel. Kaloudis* v. *Shaughnessy*, 2 Cir., 180 F. 2d 489. This broad discretionary power was apparently granted in order to give the deportation provisions of the law some flexibility in cases involving more than usual hardship, the nature and gravity of which would vary with each case as it should thereafter arise. The appellants do not contend that the grant of discretion is unconstitutional

for lack of specified standards governing its formulation. Such a contention, even if sound, would not help them. For if the grant of power were invalid, the appellants and all other hardship cases would stand confronted with rigid deportation provisions as were their predecessors before the law was liberalized.

Since the Board had this broad power (in the comparatively narrow field which comprises those found eligible for a suspension) we think that in the formulation of its discretion it might properly take into account among other factors its concept of Congressional policy as manifested in Section 244(a) of the 1952 Act. In *United States ex rel. Kaloudis* v. *Shaughnessy, supra,* at page 491, we said:

> "* * * The power of the Attorney General to suspend deportation is a dispensing power, like a judge's power to suspend the execution of a sentence, or the President's to pardon a convict. It is a matter of grace, over which courts have no review, unless—as we are assuming—it affirmatively appears that the denial has been actuated by considerations that Congress could not have intended to make relevant."

Let us somewhat develop the analogy there suggested by posing the situation which may confront a judge when he comes to impose sentence on, say, a convicted narcotic peddler. He is besought to dispose of the case by suspension of sentence and imposition of probation as under the applicable law he has power to do. In the exercise of his discretion he refuses to suspend and imposes a sentence to be served. Surely the sentence imposed is not invalid because his discretion was to some extent expressly affected by prevalent contemporary opinion that the public interest required more rigorous treatment of narcotic violators, whether such opinion was disclosed in recent Acts of Con-

gress stiffening the penalties for such violators or merely in the public press. Doubtless a just judge will not abdicate his powers to public clamor or even to legislative opinion which does not purport to control formulation of his discretionary powers. But a wise judge will not put forth judgments from an ivory tower shutting his eyes to contemporary *mores* and public opinion.

Our conclusion is not in conflict with Section 405 of the 1952 Act. That section provides that "Nothing contained in this Act * * * shall be construed to affect any proceedings * * * brought * * * at the time this Act shall take effect; *but* as to all such * * * proceedings * * * *the statutes* * * * *repealed* by this Act *are* * * * *hereby continued in force* and effect." (Emphasis supplied.) We think that "nothing contained in this Act" means *no operative provision* of this Act such as the provision establishing the standard of eligiblity. Cf. *United States ex rel. Zacharias* v. *Shaughnessy, supra.* That construction is required by the succeeding, antithetical, clause, "*but* as to all such * * * proceedings * * * the statutes repealed" are continued in effect. In other words, under Section 405 of the 1952 Act the appellants were entitled to have the application disposed of under the 1940 Act. And that right was fully accorded them. They were found eligible for suspension under the 1940 Act and the suspension was denied under the discretionary power created by the 1940 Act. The reference to Section 244(a) of the 1950 Act showed only that the Board considered its exercise of discretion to be consonant with the policy of that Act—not that the scope of its discretionary power was restricted by that Act.

Affirmed.

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FRANK, *Circuit Judge* (Dissenting):

When this court, on a petition for rehearing publishes a supplemental opinion which adheres to the previous decision, but on new grounds, the new opinion with its new rationale is invariably and correctly taken, by us and others, as reporting the basis of our decision. I think we must deal similarly with the Board. Accordingly, I think we must look to its second opinion, responsive to the motion for reconsideration, to learn the basis on which the Board refused to exercise its discretion favorably to appellants.

The Board's second opinion is set forth in full in the Appendix hereto. There the Board plainly stated, as follows, that it relied on Section 244(a) of the 1952 Act: "It is crystal clear that Congress intended to greatly restrict the granting of suspension of deportation by the change of phraseology which was used in Section 244(a) of the Immigration and Nationality Act as well as the Congressional comment at the time this provision was enacted."

Judge Dawson, in dismissing the habeas corpus writ recognized that the Board took "into account the new standard which was laid down by Congress", and held that the Board, in so doing, acted properly.

Here the Board erred. The new statute narrowed the discretion of the Attorney General and thus of his delegate, the Board. Thus the Board did not feel free to exercise the discretion it had under the properly applicable legislation, *i.e.*, the statute as it stood before the 1952 amendment. However, the new Act, as my colleagues concede, had no application to this case. Accordingly, it was precisely as if the Board, without relying on the amended Act, had declared that it would never grant discretionary relief unless deportation would "result in exceptional and extremely unusual hardship to the alien, his spouse, parent or child." Such a restriction by the Board of the breadth of its discretion was arbitrary and therefore illegal.

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This case is like *Mastrapasqua* v. *Shaughnessy*, 180 F. 2d 999, 1002-1004 (C. A. 2). There, an Italian seaman, detained in this country, during the war, sought the discretionary relief of pre-examination or, in the alterative, suspension of deportation. The Board of Immigration Appeals refused to exercise its discretion because Mastrapasqua was in a class of aliens (those in the United States solely for reasons connected with the war) which the Attorney General, in a prior case, had said should be denied discretionary relief. We held that the Board was not justified in so refusing to exercise its discretion in this class of cases, since the classification was irrational and capricious, and we ordered Mastrapasqua's release from custody unless the Board, within a reasonable time, exercised its discretion one way or the other, without reliance on any such limitation on its discretion.

My colleagues lean heavily on *U. S. ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489, 491 (C. A. 2) which suggested that the Attorney General's discretionary power to suspend deportation might be analogized to the President's power to pardon a convict. It should be noted that the *Mastrapasqua* case was decided by us less than two weeks after we decided *Kaloudis*. As the two must therefore be read together, it cannot be argued that the earlier decision (*Kaloudis*) over-ruled the later (*Mastrapasqua*) or vice versa. Moreover, in *Kaloudis*, although we said that there the denial of discretionary relief rested on a ground that was not improper, we indicated that cases might arise where the discretionary power is exercised in disregard of implied limitations. See 180 F. 2d at 490.

Kaloudis did not say that the Board, in exercising its discretion, could apply a standard which Congress specifically said was not to be applied to cases, such as this, which come within the savings clause of Section 405 of the

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Immigration and Nationality Act of 1952, 66 Stat. 280.[1] In interpreting Section 405 in connection with the application of the pre-1952 test for determining eligibility of an alien for citizenship, the Supreme Court said, in *United States* v. *Menasche,* 348 U. S. 528, 535, "The whole development of this general savings clause, its predecessors accompanying each of the recent codifications in the field of immigration and naturalization, manifests a well-established congressional policy not to strip aliens of advantages gained under prior laws. The consistent broadening of the savings provision, particularly in its general terminology, indicates that this policy of preservation was intended to apply to matters both within and without the specific contemplation of Congress."

In *United States ex rel. Zacharias* v. *Shaughnessy,* 221 F. 2d 578 (C. A. 2), this court, adopting the liberal view of the savings clause set forth in *Menasche,* held that the eligibility of an alien who came within the clause, for the discretionary relief of voluntary departure, was to be determined under the pre-1952 statute. I think that the same considerations which caused us to so hold in *Zacharias* require that we now order the Board to exercise its discretion in determining whether to suspend the deportation of petitioners without regard to the new and more severe standard adopted by Congress in the 1952 Act.

---

[1] Section 405, in part, reads "*Nothing* contained in this Act, unless specifically provided therein, shall be construed to affect any prosecution, suit, action or proceedings, civil or criminal, brought * * * at the time this Act shall take effect; but as to all such * * * proceedings * * *, the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect * * * An application for suspension of deportation under Section 19 of the Immigration Act of 1917, as amended, * * * shall be regarded as a proceeding within the meaning of this subsection." (Emphasis added.)

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APPENDIX

These cases are before us on counsel's motion to reopen the proceedings for reconsideration of the respondents' applications for suspension of deportation.

The male respondent last entered the United States on August 15, 1951 and the female respondent on July 4, 1951. Both arrived as seamen and have been found deportable on the charge that they were immigrants at the time of entry and were not in possession of immigration visas. They have one child who was born in the United States during November 1951. On March 18, 1954, we dismissed the appeals of the respondents from the hearing officer's decision granting voluntary departure and denying suspension of deportation. After considering all the facts in the case at that time, we denied suspension of deportation as a matter of administrative discretion.

Counsel's motion sets forth no matters of which we were unaware at the time our previous decision was rendered. (It is crystal clear that Congress intended to greatly restrict the granting of suspension of deportation by the change of phraseology which was used in Section 244(a) of the Immigration and Nationality Act as well as the Congressional comment at the time this provision was enacted.) We indicated in our previous order that the deportation of the respondents would result in a serious economic detriment to their citizen minor child, and we do not question that the respondents have established the statutory requirements for suspension of deportation under Section 19(c) of the Immigration Act of 1917, as amended.

Counsel argues that the two court decisions cited in our previous order involved grounds for deportation specified in Section 19(d) of the Immigration Act of 1917, as amended. These cases were not within the purview of Section 19(d) although one alien had been convicted of incest and the

other had been a member of the International Workers Order. Weddeke was not deportable because of his conviction and Kaloudis was not charged with being deportable because of his membership in the International Workers Order. In both cases, the decision of the court was predicated on the fact that, regardless of whether the aliens had established or could establish statutory eligibility, the question of whether suspension of deportation should be granted was entirely discretionary with the Attorney General and his decision was not reviewable by a court unless clearly arbitrary.

Upon our further review of the cases of the two respondents, we adhere to our previous decision that suspension of deportation should be denied as a matter of administrative discretion and counsel's motion will, therefore, be denied.

ORDER: It is ordered that counsel's motion be and the same is hereby denied.

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JOHN T. FEY, Clerk

To be argued by
JAY NICHOLAS LONG

Supreme Court of the United States

October Term, 1956

No. 205

UNITED STATES OF AMERICA, ex rel., ANASTASIOS HINTOPOULOS and ELIZABETH HINTOPOULOS,

Petitioners,

vs.

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization at the Port of New York,

Respondent.

PETITIONERS' BRIEF ON THE MERITS

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Respondent.

PETITIONERS' BRIEF ON THE MERITS

Opinions Below

The opinion of the District Court, Dawson, U. S. D. J., dismissing the writ of habeas corpus herein has been reported in 133 Federal Supplement at page 433, and also appears at page 2 of the record herein. The opinion of the Court of Appeals, affirming same has been reported, 233 F. (2d) 705. The majority opinion of Judge Hincks and Waterman and the dissenting opinion of Judge Frank are printed in the record herein at pages 16 and 23, respectively.

Statement of Grounds of Jurisdiction

1. The judgment of the Court of Appeals was rendered and entered on May 9, 1956.

2. No application for rehearing was made.

3. The Court of Appeals stayed the issuance of the mandate by order of May 28, 1956 in accordance with its Rule 28(c)(1) and (2).

4. The petition for certiorari was filed in this Court June 27, 1956 and granted October 8, 1956, 77 S. Ct. 53.

5. The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Section 1254.

Statutes and Rules Relied On

Section 19(c) of the Immigration Act of 1917, 39 Stat. 889, as amended by the Act of June 28, 1940, 54 Stat. 671, 672; the Act of December 8, 1942, c. 697, 56 Stat. 1044; and the Act of July 1, 1948, c. 783, 62 Stat. 1206; 8 U.S.C.A. (1942 Ed.), 1951 Supp., Section 155(c) provided:

> "(c) In the case of any alien (other than one to whom subsection (d) of this section is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation: or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act. If the deportation of any alien is suspended under the provisions of this subsection for more than six months, a complete and detailed

statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. These reports shall be submitted on the 1st and 15th day of each calendar month in which Congress is in session. If during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating, in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If prior to the close of the session of the Congress next following the session at which a case is reported, the Congress does not pass such a concurrent resolution, the Attorney General shall thereupon deport such alien in the manner provided by law. Deportation proceedings shall not be canceled in the case of an alien who was not legally admitted for permanent residence at the time of his last entry into the United States, unless such alien pays the Commissioner of Immigration and Naturalization a fee of $18 (which fee shall be deposited in the Treasury of the United States as miscellaneous receipts). Upon the cancellation of such proceedings in any case in which fee has been paid the Commissioner shall record the alien's admission for permanent residence as of the date of his last entry into the United States and the Secretary of State shall, if the alien was a quota immigrant at the time of entry and was not charged to the appropriate quota, reduce by one the immigration quota of the country of the alien's nationality as defined in section 212 of this title, for the fiscal year then current at the time of cancellation or the next following year in which a quota is available: Provided, That no quota shall be reduced by more than 50 per centum in any fiscal year. As amended December 8, 1942, c. 697, 56 Stat. 1044; July 1, 1948, c. 783, 62 Stat. 1206."

Section 405(a) of the McCarran Immigration and Nationality Act of June 27, 1952, 66 Stat. 280, 8 U.S.C. 1101 note, which, insofar as relevant, provides:

> "(a) Nothing in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any * * * proceeding which shall be valid at the time this Act shall take effect; or to affect any * * * proceedings, civil or criminal, brought, * * * at the time this Act shall take effect; but as to all such * * * proceedings * * * the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * * *An application for suspension of deportation under Section 19 of the Immigration Act of 1917, as amended, * * * which is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection.*" (Italics supplied.)

Question Presented for Review

Whether or not the Courts below erred in not holding that it was an improper exercise of discretion, or in effect a total failure to exercise its discretion under the appropriate statute, for the Board of Immigration Appeals to permit its action in a matter solely within the purview of Section 19(c)(2) of the Immigration Act of February 5, 1917, as amended, to be unduly narrowed and influenced by Congressional Committee Reports made in the course of the enactment of the subsequent Immigration and Nationality Act of June 27, 1952, and the provisions of that 1952 Act, which, in its Saving Clause, Section 405, expressly provides that said 1917 Act, as amended, shall solely apply to cases which arose prior to the effective date of said 1952 Act?

Statement of the Case

The facts appear in the minutes of immigration hearing at Ellis Island on May 29, 1952, and are contained in file of the Immigration Service which is a part of appellee's return to the writ by reference.

Petitioners are husband and wife, and both are of Greek ethnic origin and nationality. The husband was born June 30, 1913 in Trapesund, Turkey, and was taken to Greece in 1922, when nine years of age, as a Greek repatriate. The wife was born December 28, 1923 in Rostov, Russia and was taken to Greece in November, 1938, when fourteen years of age, as a Greek repatriate. Their American-born child is now five years of age and resides with them in New York.

Both were admitted lawfully to the United States as crew members on the steamship "Panagiotis Koumandaros", the female on July 4, 1951 at Newport News, Virginia, and the male on August 15, 1951 at Baltimore, Maryland, their last entries into the United States.

The male had served on vessels for at least fifteen years previously, including the dangerous war period, and on the S. S. "Panagiotis Koumandaros", on which he last arrived in the United States, for at least three years. He had made at least 30 entries into the United States as a seaman before his last entry upon which the warrants of arrest and deportation herein are predicated. He had at no time previously overstayed his leave and had always departed on the vessel on which he had arrived.

In 1950 petitioners agreed to enter into marriage with each other. However, since the vessel on which the male was employed was not scheduled for an early stop at a Greek port they arranged for the female to meet the male at Casablanca, French Morocco at a time when his ship was scheduled to be there. As a result they were married in Casablanca on December 6, 1950.

The male had been employed on the S. S. "Panagiotis Koumandaros" since 1948. Desiring his wife to be with him, he arranged for her employment thereon as an assistant steward. From the time of her said employment (December 1950) until her last entry into the United States on July 4, 1951 at Newport News, she was continuously employed on said vessel, had made at least four entries as a crew member into the United States, had always departed with the vessel, and had never overstayed her leave.

During that period of about seven months the female conceived a child. Although pregnant, she continued in her employment on the S. S. "Panagiotis Koumandaros". However, on her fifth trip to the United States she was in her sixth month of pregnancy and became seriously ill. She needed medical attention, and when the vessel arrived at Newport News in July, 1951 she decided to seek medical advice because of her distressed condition. She proceeded to New York by bus and consulted Dr. C. Paul O'Connell at the Harkness Pavilion at the Medical Center on July 23, 1951. His certificate, which is a part of the record, states "* * * that no woman at this stage of pregnancy should undertake ocean voyages, as it places them too far from adequate medical care in the event of an obstetrical emergency".

It was only because of her aggravated condition and the advice of her doctor that a return to her duties on ship would imperil both her life and that of her expected child that she decided to remain ashore until her child was born. This is confirmed by her husband's action—he did not leave the ship with his wife. To the contrary, he continued his employment and departed with the vessel in the hope that upon the next arrival of his ship in the United States his wife would be in condition to rejoin him. His next arrival was at Baltimore, Maryland on August 15, 1951 and he went ashore with the intention of reshipping. It was only after he saw his wife, learned the seriousness

of her condition, and heard her pleas that he remain with her until the birth of their child, since they had neither relatives nor friends in the United States, that he decided to remain ashore with her.

Only after their child was born on November 11, 1951 did they conceive the hope that they could remain in the United States to give their child the educational, spiritual and material benefits available to him here but not in Greece, where economic conditions have been so bad for years as to necessitate the enactment by our Congress, successively, of the Displaced Persons Act and the present Refugee Relief Act to relieve that greatly overcrowded and distressed country, and others similarly situated.

During the five years which have elapsed since their entries in the summer of 1951, they have been wholly self-supporting, have established a comfortable home for themselves and their American citizen child, have been law-abiding, and in every way have comported themselves as good members of the community in which they have lived.

On January 4, 1952, less than two months after the birth of their child, and more than five months prior to the enactment of the Immigration and Nationality Act on June 27, 1952, they voluntarily disclosed their presence in the United States and made and filed with the New York office of the Immigration Service formal applications for suspension of deportation pursuant to the provisions of Section 19(c)(2) of the Immigration Act of February 5, 1917 (8 U.S.C. 155(c)(2), which provides:

> "(c) In the case of any alien * * * who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may * * * (2) suspend deportation of such alien * * * if he finds (a) that

such deportation would result in serious economic detriment to a citizen or legally resident alien who is the * * * minor child of such deportable alien; * * *."

Thereafter on April 9, 1952 warrants of arrest in deportation proceedings issued against both, and on May 29, 1952 they were accorded a hearing thereunder at Ellis Island.

At the conclusion of said hearing of May 29, 1952 at Ellis Island, the Hearing Officer made a decision, R. 7, 8, in which he stated:

"Both respondents have applied for suspension of deportation on the ground of the economic detriment that would befall their minor son in the event they were deported. They have asked in the alternative for voluntary departure in lieu of deportation. Both disclaim having a criminal record anywhere and both allege that they have been persons of good moral character. Evidence of record would tend to corroborate their testimony in this respect. Their only income is from the employment of the male respondent on two jobs, the one as a salesman and the other as a superintendent of the apartment house in which they live. His combined income amounts to approximately $64.00 a week. Their joint assets consist of savings in the sum of about $500.00 and their furniture and other personal property which they value at $1500.00. While it would seem that their son, who was born in New York City in November 1951 would suffer economically if his parents should be deported, it is not believed that as a matter of administrative discretion the respondents' applications for suspension of deportation should be granted. They have been in the United States for a period of less than one year. They have no relatives in this country other than each other and their son. To grant both this form of relief upon

> the accident of birth in the United States of their son would be to deprive others who are patiently awaiting visas under their already oversubscribed quotas."

He assigned no other reason whatsoever for the denial of suspension of deportation and failed to mention that such "accident of birth" made the child a citizen of the United States under the Constitution. His last quoted sentence is at utter variance with the true facts because, in enacting Subsection (c) of 8 U. S. C. 155, Congress very carefully provided that in cases wherein suspension of deportation was granted, the deportation proceedings should be cancelled, and that:

> "Upon the cancellation of such proceedings in any case in which fee has been paid the Commissioner shall record the alien's admission for permanent residence as of the date of his last entry into the United States and the Secretary of State shall, if the alien was a quota immigrant at the time of entry and was not charged to the appropriate quota, reduce by one the immigration quota of the country of the alien's nationality as defined in section 212 of this title, for the fiscal year then current at the time of cancellation or the next following year in which a quota is available: Provided, *that no quota shall be reduced by more than 50 per centum in any fiscal year.*" (Italics supplied)

It is commonly known that the small Greek quota long since was thus reduced to 50%, and will continue to be beyond the year 2,000, so that the granting of suspension of deportation to petitioners would not adversely affect anyone.

At the conclusion of said hearing, both appellants appealed to the Board of Immigration Appeals from said decision. The Board heard said appeals on January 23,

1953, and on March 18, 1954 made a decision denying suspension of deportation and dismissing the appeals, R. 11, 12, wherein it stated:

> "It is obvious that the American citizen infant child is dependent upon the alien parents for economic support, care and maintenance. Documentary and other evidence establish good moral character for the requisite period. The aliens have no connection with subversive groups." • • •
>
> "Notwthstanding the fact that • • • the deportation of these respondents would result in a serious economic detriment to an American citizen infant child, the granting or withholding of maximum discretionary relief depends on the factors and merits in each individual case, and is a matter of administrative discretion. We have carefully examined the facts and circumstances in the instant case and we find that the granting of the maximum relief is not warranted by the record in the case. The appeals will be dismissed."

The irony of the situation becomes apparent when it is noted that, in support of the proposition that the granting or withholding of the privilege of suspension of deportation is a matter of administrative discretion, the Board cites two cases, *Weddeke* v. *Watkins,* 166 F. 2d 369; and *Kaloudis* v. *Shaughnessy,* 180 F. 2d 489. In each of these cases the manner in which the discretionary power was exercised was controlled by a fact inherent in the case and appearing in the record—Weddeke had been convicted of Incest upon an infant child, and Kaloudis had been a member of the International Workers Order, a red organization. In the instant case, as stated by both the Hearing Officer and the Board, the petitioners are and always have been persons of good moral character, and the record does not contain a single word of evidence to the contrary.

As neither the Hearing Officer's said decision nor the Board's said decision assigned any valid reason for same, and as they were totally unsupported by any evidence adduced at the hearing, a motion was made before the Board of Immigration Appeals to reopen and reconsider the matter, and on May 5, 1954 the Board made a decision, R. 14, 15, in which it stated:

> "Counsel's motion sets forth no matters of which we were unaware at the time our previous decision was rendered. *It is crystal clear that Congress intended to greatly restrict the granting of suspension of deportation by the change of phraseology which was used in Section 244(a) of the Immigration and Nationality Act as well as the Congressional comment at the time this provision was enacted* (June 27, 1952). We indicated in our previous order that the deportation of the respondents would result in a serious economic detriment to their citizen minor child, and we do not question that the respondents have established the statutory requirements for suspension of deportation under Section 19(c) of the Immigration Act of 1917, as amended." (Italics supplied).

Here, for the first time, the real reason for the Board's action appears. Instead of considering and deciding the case solely under the provisions of Section 19(c) of the Immigration Act of 1917, as amended, 8 U.S.C. 155(c), the Board erroneously based its decision upon what it believed was the intent of Congress in enacting the subsequent McCarran Immigration and Nationality Act of June 27, 1952 which, by the express provisions of its savings clause, Section 405(a), 8 U.S.C. 1101, note, provides that the provisions of the 1917 Act shall solely apply to applications for suspension of deportation pending prior to June 27, 1952, the date of its enactment.

ARGUMENT

POINT I

Petitioners have been denied due process of law, and the decision is not supported by the evidence.

On July 14, 1955, petitioners instituted the present habeas corpus proceeding, which the District Court below, Honorable Archie O. Dawson, U.S.D.J., dismissed on August 1, 1955 with an opinion, in which he stated, R. 4;

> "Prior to the final determination of this matter by the Board of Immigration Appeals, Congress had enacted the Immigration and Nationality Act, of 1952. Under the 1917 Act, as amended, the applicant for suspension of deportation had to show 'serious economic detriment.' Under the 1952 Act, the applicant would have to show that the deportation would 'result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child,' 8 U.S.C., Sec. 1254(a)(1).
>
> In the consideration of the 1952 Act in Congress, this change in the test to be applied to suspension of deportation was considered. The Senate Judiciary Committee, in its report on the Bill which subsequently became law, said:
>
> > 'The bill accordingly establishes a policy that the administrative remedy should be available only in the very limited category of cases in which the deportation of the alien would be unconscionable. Hardship or even unusual hardship to the alien or to his spouse, parent, or child is not sufficient to justify suspension of deportation.' • • •
>
> The Attorney General, in exercising his discretion, could take into account the new standard which was

laid down by Congress. The new standard was referred to in the decision of the Board of Immigration Appeals of May 5, 1954."

This is error, especially in the light of the Saving Clause of the 1952 Act, Sec. 405(a); *supra*, which expressly provides that the 1917 Act shall control as to suspension cases pending at the time of the enactment of the 1952 Act, as was the instant case. In his dissenting opinion herein Judge Frank stated, R. 24:

> "Judge Dawson, in dismissing the habeas corpus writ recognized that the Board took 'into account the new standard which was laid down by Congress,' and held that the Board, in so doing, acted properly.
>
> Here the Board erred. The new statute narrowed the discretion of the Attorney General and thus of his delegate, the Board. Thus the Board did not feel free to exercise the discretion it had under the properly applicable legislation, i. e., the statute as it stood before the 1952 amendment. However, the new Act, as my colleagues concede, had no application to this case. Accordingly, it was precisely as if the Board, without relying on the amended Act, had declared that it would never grant discretionary relief unless deportation would 'result in exceptional and extremely unusual hardship to the alien, his spouse, parent or child.' Such a restriction by the Board of the breadth of its discretion was arbitrary and therefore illegal."

At the bottoms of pages 5 and 6 of his opinion, Judge Dawson quotes from a report made by the Senate Judiciary Committee prior to the enactment of said inapplicable 1952 Act, to support the foregoing erroneous conclusion. However, if it is at all necessary to examine the intent of Congress herein, it should be done with regard to that of the

76th Congress which enacted the Alien Registration Act of 1940, which amended said Section 19 of the Act of 1917 by adding thereto Subsection (c), the applicable provision of law in the instant case, as continued in force by said Section 405(a) of the McCarran Immigration and Nationality Act of June 27, 1952, 8 U.S.C. 1101 Note, *supra*.

House Report No. 2683 of the Conference Committee dated June 21, 1940 to accompany H. R. 5138, to amend Section 19 of the Act of February 5, 1917 by adding Subsections (c) and (d) thereto, states at page 9:

> "Subsection (c) provides that certain cases, generally those in which aliens are deportable solely because of illegal entry, the Attorney General may allow aliens to depart at their own expense, or may, subject to congressional review, *suspend orders of deportation where deportation would result in unwarranted hardship.*"

On the basis of that Conference Report the Senate and House enacted said amendment, and on June 28, 1940 the President approved same, which, insofar as relevant to the instant case, reads as follows:

> "(c) In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who proved good moral character for the preceding five years, the Attorney General may * * * suspend deportation of such alien * * * if he finds that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien."

The very language indicates that its purpose was and is to protect the American citizen or legally resident alien

dependent on the deportable alien, and not such deportable alien. It remained unchanged during the ensuing 12 years until June 27, 1952, when the McCarran Act was enacted, and continued it in force as to cases pending on June 27, 1952, as was the case at bar.

That the Board of Immigration Appeals has so construed it is clear from its numerous decisions thereunder.

In *In re Emilio Consigliera*, A-2146468, decided by the Board on October 9, 1947, suspension of deportation had been denied by both the Hearing Officer and the Central Office because of certain acts on the part of the respondent, and in reversing the decision below the Board stated:

> "And in this connection we must remember that *we are not concerned with the respondent as an individual but as a head of an American family.*"

The case of *Mariangoula T. Tsolainos*, A-6250408, decided by the Board on November 25, 1949, is directly in point. That case involved a Greek citizen who was admitted as a visitor for six months. One month after her arrival she married a Greek citizen, then illegally in the United States. A male child was born of that union. The mother applied for suspension of deportation. The Central Office denied the application. The Board of Immigration Appeals reversed and granted suspension, adopting the view of counsel that:

> "As a matter of ordinary common sense, no one could possibly take the position that the loss of a two year old's mother would not be a serious detriment to the child because no amount of nurses, governesses and pediatricians could take the place in this or any child's life of the love and care of his mother. On the other hand, if the child were to be taken to Europe he would be forced to suffer the detriment of being brought up in a foreign land * * *.

This Board has given careful consideration to all the evidence of record, as well as all of the representations of counsel, and to the decision of the Assistant Commissioner of Immigration and Naturalization, and it is our conclusion that to enforce the departure of this appellant from the United States would in our opinion result in a serious economic detriment to this minor United States born child, particularly in the light of the condition of the quota of Greece, as well as the present chaotic conditions abroad, particularly in the country of the alien's nativity * * *."

On July 21, 1944, file 56111/780, the Board ruled to the effect that serious economic detriment exists if the effect of deportation of the applicant would be substantially to lower the standard of living of the dependent relative.

On May 15, 1943, file 56050/380, it ruled to the effect that when an alien has property worth $300 and takes care of her home and looks after the needs of her two American-born minor children, deportation would work serious economic detriment to the children, although the family receives $62.50 of public funds monthly for its maintenance.

On March 13, 1943, file 55834/444, it ruled to the effect that when an alien minor child is dependent on her United States citizen mother whose income is $30 per month, deportation of the child would result in serious economic detriment to the mother, for the mother then would be required to maintain two households from her income.

On March 30, 1943, file 56093/577, it ruled to the effect that the fact that an alien does not earn sufficient income to support his relatives, who must rely on public funds for the remainder of their maintenance, is not sufficient to

deny favorable consideration of his application for suspension of deportation, as to deport him would cause the loss of whatever income he does earn and increases the burden upon relief authorities.

On March 31, 1943, file 55930/335, it ruled to the effect that an alien woman who lives with and is completely occupied in the upbringing of her minor native-born citizen children, the family being supported by public relief funds in the absence of her husband, is performing services of economic value and her deportation would result in a serious economic detriment to her minor children.

In each of the above cases the aim was to avoid depriving the citizen dependent of the support of the deportable alien, no matter how meager the contribution might be. The citizen dependent's welfare, not that of the deportable alien, was and is the prime consideration, and each of said cases carried out the purpose and intent of the statute,

On December 24, 1952 his Honor, Judge Bondy, rendered an opinion in *Avgerinos* v. *Shaughnessy,* Civ. 79-104, in which he stated:

> "* * * The relator does not question his deportability. The sole question is whether suspension may be denied as a matter of discretion without disclosing the evidence on which the denial is based and without even disclosing the conclusion drawn from the undisclosed confidential information. * * *
>
> The District Court for the District of Columbia held in *Alexiou* v. *McGrath,* 101 F. Supp. 421 that although denial of relief is discretionary, nevertheless after the Attorney General had promulgated regulations establishing a procedure assuring a fair hearing on the issue of discretionary relief such procedure must be followed and that consideration of the confidential evidence without the disclosure thereof was error. See *U. S. ex rel. Salvetti* v. *Reimer,* 103

F. (2d) 777, 779; *U. S. ex rel. Weddecke* v. *Watkins*, 166 F. (2d) 369, 371; and the decision by this court in *U. S. ex rel. Bauer* v. *Shaughnessy*, Civ. 50-217 U.S.D.C., S.D.N.Y., July 28, 1949."

The petitioners herein are aliens who have entered the United States and they are entitled to due process of law, as was held by the Supreme Court in *Shaughnessy, District Director* v. *U. S. ex rel. Mezei*, 73 S. Ct. 625, in which, at page 629, it stated:

> "(3-6) It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. *The Japanese Immigrant Case* (*Karou Yanataya* v. *Fisher*), 1903, 189 U. S. 86, 100-101, 23 S. Ct. 611, 614, 47 L. Ed. 721; *Wong Yang Sung* v. *McGrath*, 1950, 339 U. S. 33, 49-50, 70 S. Ct. 445, 453-454, 94 L. Ed. 616; *Kwong Hai Chew* v. *Colding*, 1953, 344 U. S. 590, 598, 73 S. Ct. 472, 478."

In the *Avgerinos* case, *supra*, citing 17 Fed. Reg. 4740, 4741, Part 151, Judge Bondy defines "due process of law", as applicable to cases such as the instant one, in the following language:

> "The regulations in effect at the time of the Board's decision, and still in effect, provide that: the hearing officer may at such time, as he deems appropriate, advise the alien of his right to apply for discretionary relief, 151.2(c); the alien may at any time during the hearing under the warrant apply for one or more forms of discretionary relief from deportation, 151.3(e). The hearing officer shall present at the hearing 'all available evidence concerning factors bearing upon statutory eligibility for discretionary relief', 151.2(c) (4), and such other information as

may be pertinent to the issue of the case, 151.2(c) (5); the alien has a right to the presence of his counsel, and he or the counsel 'shall be permitted to offer evidence to meet any evidence adduced against the alien and to cross-examine witnesses.' 151.2(g); in addition he may submit any written or oral material which he believes should be considered in the exercise of discretion, 151.3(e); as soon as practicable after the hearing the hearing officer shall make 'a decision which shall set forth a summary of the evidence adduced and his findings of fact and conclusions of law as to deportability; if the alien has applied for discretionary relief * * * the decision shall also contain a discussion of the evidence relating to the alien's eligibility for such relief and the reasons for granting or denying such an application', 151.5(a); the decision shall be concluded with an order that the alien be deported, proceedings terminated or that discretionary relief be granted, 151.5(a)(c). Lastly, 151.2(b) expressly provides 'The hearing officer shall conduct a fair and impartial hearing.' (Part 151 as amended in 17 F. R. 4740, 4741.)

These regulations clearly establish that they were enacted in order to assure a fair hearing as a basis for the exercise of discretion conferred upon the Attorney General. The regulations have the force of law and must be followed. *Bilokumsky* v. *Tod*, 263 U. S. 149, 155; *Bridges* v. *Wilson*, 326 U. S. 135; 153. See *U. S. ex rel. Salvetti* v. *Reimer*, supra; *U. S. ex rel. Weddecke* v. *Watkins*, supra."

Most certainly the procedure in the case at bar does not meet requirements of the regulations so carefully enumerated in Judge Bondy's above quoted decision. The hearing officer and the Board both found that both petitioners were statutorily eligible for suspension of deporta-

tion, but, in denying same, failed utterly to assign any valid reason based upon the evidence adduced at the hearing, or otherwise, for such denial.

Therefore, petitioners were denied due process of law.

POINT II

The Attorney General's arbitrary exercise of discretion, or failure to exercise discretion under the applicable statute, is subject to judicial review.

Respondent, at page 2 of the brief in opposition to granting of certiorari herein, inadvertently quoted Section 19 (c) of the Immigration Act of 1917 as amended to 1940, but not as further amended by the Act of Dec. 8, 1942, c. 697, 56 Stat. 1044; and the Act of July 1, 1948, c. 783, 62 Stat. 1206; as set forth in 1951 Supp. to 8 U.S.C.A. (1942 Ed.), Sec. 155 (c).

At page 5 of said opposition brief respondent also quoted Section 244(a)(5) of the Immigration and Nationality Act of June 27, 1952, which has absolutely no bearing on the issues herein because the suspension applications herein were pending prior to such enactment, and the Savings Clause of said 1952 Act, Sec. 405(a), *supra*, expressly provides that as to all such applications the 1917 Act, as amended, is "hereby continued in force and effect."

At page 13 of said opposition brief respondent quoted from this Court's recent decision in *Jay* v. *Boyd*, 76 S. Ct. 919, 925, as follows:

> "* * * However, Congress did not provide statutory standards for determining who, among qualified applicants for suspension, should receive the ultimate relief. That determination is left to the sound discretion of the Attorney General. The statute says that, as to qualified deportable aliens, the Attorney

General 'may, in his discretion' suspend deportation. It does not restrict the considerations which may be relied upon or the procedure by which the discretion should be exercised."

Here the Court was discussing the 1952 Act, and not the 1917 Act, as amended, which solely applies to the case at bar and does not contain the words "in his discretion." In footnote 15 to said opinion this Court states:

"15. Congress first provided for suspension of deportation in 1940 by adding a new provision to the Immigration Act of 1917. 54 Stat. 672, as amended, 62 Stat. 1206, 8 U.S.C. (1946 ed., Supp. V) Sec. 155(c). That new provision provided that 'the Attorney General may • • • suspend deportation' under certain circumstances. In enacting the Immigration and Nationality Act of 1952, Congress added the phrase 'in his discretion' after the words 'the Attorney General may.' In an analysis of draft legislation leading up to the 1952 Act, prepared by the Immigration and Naturalization Service for the assistance of the congressional committees, it was stated that the new words were suggested 'in order to indicate clearly that the grant of suspension is entirely discretionary • • •.' That analysis was considered by the congressional committees. See S. Rep. No. 1137, 82d Cong., 2d Sess., p. 3; H. R. Rep. No. 1365, 82d Cong., 2d Sess., p. 28."

Further, under the 1917 Act the beneficiaries of the relief are the "citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien" who would suffer serious economic detriment by his deportation, a class of persons entitled to the utmost consideration under the law, and no mention is made of benefit to the deportable alien; whereas, under the 1952 Act the benefit accrues

to "*the* (*deportable*) *alien* or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence," and, accordingly, Congress broadened the power of the Attorney General by including in the 1952 provision the words "in his discretion." In other words, under the 1917 statute the word "may" is almost interchangeable with "shall" if the eligibility tests of that statute are met, whereas in the 1952 statute Congress deliberately removed any question by including the phrase "in his discretion." However, the 1952 Act most certainly did not enlarge the Attorney General's discretionary power to the extent that he could apply the narrower restrictions of that Act to cases pending on June 27, 1952, which its Savings Clause, Sec. 405(a), expressly provided should be subject solely to the broader provisions of Sec. 19 (c) of the 1917 Act, and regulations lawfully made thereunder, 17 Fed. Reg. 4740, 4741, Part 151.

At page 13 respondent's said opposition brief quotes further from *Jay* v. *Boyd, supra,* as follows:

> "Although such aliens have been given a right to a discretionary determination on an application for suspension, cf. Accardi v. Shaughnessy, 347 U. S. 260, a grant thereof is manifestly not a matter of right under any circumstances, but rather is in all cases a matter of grace. Like probation or suspension of criminal sentence, it 'comes as an act of grace,' Escoe v. Zerbst, 295 U. S. 490, 492, and 'cannot be demanded as a right,' Berman v. United States, 302 U. S. 211, 213. And this unfettered discretion of the Attorney General with respect to suspension of deportation is analogous to the Board of Parole's powers to release federal prisoners on parole." (Emphasis added.)

However, the word "unfettered" is probably used in its broadest sense, because every administrative official is bound by the limitations of the statutes under which he

claims jurisdiction in particular instances, and, even as to the federal parole board, in *McNally* v. *Hill*, Warden, 55 S. Ct. 24, 28, this Court said:

> "(8) The petitioner asks here only a ruling which will establish his eligibility for parole, because of the invalidity of the sentence on the third count. *The ruling sought is such as might be obtained in a proceeding brought to mandamus the parole board to entertain his petition for parole, if the sentence on the third count were void for want of jurisdiction of the court to pronounce it.* This use of habeas corpus is unauthorized by the statutes of the United States, and for that reason the judgment must be affirmed." (Our italics.)

In the return to the writ of habeas corpus herein, respondent stated in paragraph 15:

> "The denial by the Board of Immigration Appeals of the discretionary privilege of suspension of deportation, in the circumstances of these cases, is not subject to judicial review. (See *Kaloudis* v. *Shaughnessy*, 180 F. 2nd 489). The granting of a joint executive and legislative 'pardon' from deportation is a matter of grace and is a discretionary matter wherein the courts may not intervene." (See also: *U. S. ex rel. Bartsch* v. *District Director*, 175 F. 2d 245; *U. S. ex rel. Ciannamea* v. *Neely*, 202 F. 2d 289; *U. S. ex rel. Adel* v. *Shaughnessy*, 183 F. 2d 371; *U. S. ex rel. James* v. *Shaughnessy*, 202 F. 2d 519; *cert. denied* 345 U. S. 969; *U. S. ex rel. Matranga* v. *Mackay*, 210 F. 2d 160, cert. denied 347 U. S. 967.)

However, an examination of the cited cases and other cases will show that in every one of them there was evidence adduced at the hearings which fully justified the manner in which the discretionary power was exercised against the alien's contention, for instance, in the *Weddeke* and

Kaloudis cases, *supra*, the former had been convicted of incest upon a child, and the latter had been a member of a subversive organization. In *Jay v. Boyd*, *supra*, Jay likewise had been a member of a subversive organization, and the main question before this Court was the propriety of the consideration by the Board of Immigration Appeals of confidential information undisclosed to petitioner for reasons of national security. No such evidence was adduced in the immigration proceedings in the case at bar.

Further, in 1950 the Court below held in *Mastrapasqua* v. *Shaughnessy*, C.A.N.Y. 1950, 180 F. 2d 999, that where Board of Immigration Appeals refused to exercise general discretionary power to grant deportable aliens a pre-examination as to right of re-entry or suspension of deportation, on sole ground that Italian applicant was an alien whose presence within the United States was due solely to World War II, and that the Attorney General had decided without explanation that no discretionary relief should be accorded such persons, classification was capricious, and alien was entitled to release in habeas corpus proceeding unless within reasonable time set by the District Court discretion was exercised.

In 1953 the United States District Court for the District of Columbia, in *U. S. ex rel. Athanasopoulos* v. *Reid*, 110 F. Supp. 200, held that although Attorney General was vested with sole discretion to permit voluntary departure of aliens in lieu of deportation in situations specified by former Section 155 of Title 8, omissions from record and exclusion by hearing officer of competent evidence constituted an infringement of law in that reviewing authority had no basis upon which to exercise discretion.

The two last cited decisions are in accord with a long line of decisions running back through the last century, and they, together with Judge Bondy's said decision of December 24, 1952, Civil 79-104, in *Avgerinos* v. *Shaugh-*

nessy, supra, and that of the District Court for the District of Columbia in *Alexiou* v. *McGrath,* 101 F. Supp. 421 (1951), *supra,* completely nullify the above-quoted contention of the respondent herein.

In the instant case there has been a total failure to properly exercise discretion, and no evidence was adduced at the immigration hearing to support the erroneous decision herein.

CONCLUSION

It is respectfully submitted that the decision below should be reversed, and, in accordance with *McGrath* v. *Kristensen,* 340 U. S. 162, at 170, 171, the case should be remanded to the immigration authorities for a redetermination of petitioners' eligibility for relief, with instructions as to the correct interpretation of Section 19(c) of the Immigration Act of 1917, as amended, 8 U.S.C.A. 155(c), *supra.*

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1956

UNITED STATES OF AMERICA, EX REL. ANASTASIOS HINTOPOULOS AND ELIZABETH HINTOPOULOS, *Petitioners*

v.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION AT THE PORT OF NEW YORK

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 205

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (Pet. 29-40) are not yet reported. The opinion of the District Court for the Southern District of New York (Pet. 23-28) is reported at 133 F. Supp. 433.

JURISDICTION

The judgment of the Court of Appeals was entered on May 9, 1956 (Pet. 29). The petition for a writ of

certiorari was filed on June 27, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the exercise of administrative discretion by the Board of Immigration Appeals, in denying petitioners' applications for suspension of deportation under the provisions of Section 19(c) of the Immigration Act of 1917, was improperly influenced by the provisions and legislative history of the Immigration and Nationality Act of 1952, which evidenced Congressional intent to curtail the granting of such suspensions but which provided in its saving clause that applications already pending should be considered under the 1917 Act.

STATUTES INVOLVED

Section 19(c) of the Immigration Act of 1917, 39 Stat. 889, as amended by the Act of June 28, 1940, 54 Stat. 671, 672, 8 U.S.C. (1940 ed.) 155(c), provided in pertinent part:

> (c) In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation, or (2) suspend deportation of such alien if not racially inadmissible or ineligible to naturalization in the United States if he finds that such deportation would result in serious economic detriment to a citizen or legally

resident alien who is the spouse, parent, or minor child of such deportable alien. If the deportation of any alien is suspended under the provisions of this subsection for more than six months, all of the facts and pertinent provisions of law in the case shall be reported to the Congress within ten days after the beginning of its next regular session, with the reasons for such suspension. The Clerk of the House shall have such report printed as a public document. If during that session the two Houses pass a concurrent resolution stating in substance that the Congress does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien in the manner provided by law. If during that session the two Houses do not pass such a resolution, the Attorney General shall cancel deportation proceedings upon the termination of such session, except that such proceedings shall not be canceled in the case of any alien who was not legally admitted for permanent residence at the time of his last entry into the United States, unless such alien pays to the Commissioner of Immigration and Naturalization a fee of $18 (which fee shall be deposited in the Treasury of the United States as miscellaneous receipts). Upon the cancellation of such proceedings in any case in which such fee has been paid, the Commissioner shall record the alien's admission for permanent residence as of the date of his last entry into the United States and the Secretary of State shall, if the alien was a quota immigrant at the time of entry and was not charged to the appropriate quota, reduce by one the immigration quota of the country of the alien's nationality as defined in section 12 of the

Act of May 26, 1924 (U.S.C., title 8, sec. 212), for the fiscal year then current or next following.

Section 244(a)(5) of the Immigration and Nationality Act of 1952, 66 Stat. 215, 8 U.S.C. 1254(a)(5), provides:

> Sec. 244. (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—
>
> * * *
>
> (5) is deportable under paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17) or (18) of section 241 (a) for an act committed or status acquired subsequent to such entry into the United States or having last entered the United States within two years prior to, or at any time after the date of enactment of this Act, is deportable under paragraph (2) of section 241 (a) as a person who has remained longer in the United States than the period for which he was admitted; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hard-

ship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence.

Section 405(a) of the Immigration and Nationality Act of 1952, 66 Stat. 280, 8 U.S.C. 1101, note, provides:

Sec. 405. (a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. When an immigrant, in possession of an unexpired immigrant visa issued prior to the effective date of this Act, makes application for admission, his admissibility shall be determined under the provisions of law in effect on the date of the issuance of such visa. An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended, or for adjustment of status under section 4 of the Displaced Persons Act of 1948, as amended, which

is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection.

STATEMENT

This is a habeas corpus proceeding to test the validity of an order of the Board of Immigration Appeals, which denied the petitioners' request for suspension of deportation under the provisions of Section 19(*c*) of the Immigration Act of 1917 (*supra*, pp. 2-4) The writ was dismissed by the District Court for the Southern District of New York (Pet. 23-28; R. 3-7), and the dismissal was affirmed on appeal (Pet. 29-37; R. 31), Judge Frank dissenting (Pet. 38-40; R. 31-34).

The following facts were found by a hearing officer of the Immigration and Naturalization Service at a hearing held on May 29, 1952:

Petitioners are husband and wife, both citizens of Greece, who entered this country legally as seamen in 1951, the wife in July and the husband in August, and overstayed their temporary admission as seamen. The wife testified at one point that she knew she was pregnant at the time of her admission and wished to remain here until her child was born. Later she stated that at the time of her entry she intended to be examined by a doctor ashore to determine if she could continue to travel in her pregnant state. (R. 9.) She conceded that she intended to abide by the doctor's advice as to the length of time she should remain in this country (R. 10). Her husband stated that he left his ship because of his wife's illness and intended

to remain here until she recovered (R. 9). On these uncontroverted facts, the hearing officer found petitioners deportable, as immigrants without visas, under Sections 13 and 14 of the Immigration Act of May 26, 1924 (R. 11-12).

On the basis of the fact that their child (born in this country in November 1951) was a citizen of the United States, and that their deportation would result in serious economic detriment to him, petitioners, at the time of the deportation hearing, applied for suspension of deportation under the provisions of Section 19(c) of the Immigration Act of 1917 (*supra*, pp. 2-4) (R. 10). In denying suspension, the hearing officer stated (R. 10-11):

> Both respondents have applied for suspension of deportation on the ground of the economic detriment that would befall their minor son in the event they were deported. They have asked in the alternative for voluntary departure in lieu of deportation. Both disclaim having a criminal record anywhere and both allege that they have been persons of good moral character. Evidence of record would tend to corroborate their testimony in this respect. Their only income is from the employment of the male respondent on two jobs, the one as a salesman and the other as a superintendent of the apartment house in which they live. His combined income amounts to approximately $64 a week. Their joint assets consist of savings in the sum of about $500 and their furniture and other personal property which they value at $1500. While it would seem that their son, who was born in New York City in November, 1951 would suffer economically if his

parents should be deported, it is not believed that as a matter of administrative discretion the respondents' applications for suspension of deportation should be granted. They have been in the United States for a period of less than one year. They have no relatives in this country other than each other and their son. To grant both this form of relief upon the accident of birth in the United States of their son would be to deprive others, who are patiently awaiting visas under their already oversubscribed quotas. It is noted also that neither respondent reported his and her presence in the United States at any time until January, 1952 when they filed applications for suspension of deportation just two months after the birth of their child. However, since they meet the statutory requirements for the alternative application they have made and since they have indicated that they would be willing and are able to leave this country within the period of approximately thirty days, their applications for voluntary departure in lieu of deportation will be granted. * * *

The denial of suspension of deportation was appealed to the Board of Immigration Appeals. In its order of March 18, 1954, denying suspension and dismissing the appeal, the Board stated in part (R. 16):

> As stated above, we have, in the instant case, a family consisting of two alien parents illegally residing in the United States and one American citizen child, age about two and one-half years. These respondents have been in the United States for a period of less than three years. Both arrived in this country as seamen. They have no other

dependents or close family ties here. The record indicates that the male respondent may be able to obtain work as a Greek seaman and earn about $85 monthly.

Notwithstanding the fact that the family situation in the case before us is similar to the situation in the case last referred to by counsel, in which a decision was made in 1951; and notwithstanding the fact that the deportation of these respondents would result in a serious economic detriment to an American citizen infant child, the granting or withholding of maximum discretionary relief depends on the factors and merits in each individual case, and is a matter of administrative discretion.[1] We have carefully examined the facts and circumstances in the instant case and we find that the granting of the maximum relief is not warranted by the record in the case. The appeals will be dismissed.

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[1] *Weddeke* v. *Watkins*, 166 F. 2d 369; and *Kaloudis* v. *Shaughnessy*, 180 F. 2d 489.

On May 5, 1954, the Board denied petitioners' motion for reconsideration (R. 17-19) and stated (R. 18-19):

* * * On March 18, 1954, we dismissed the appeals of the respondents from the hearing officer's decision granting voluntary departure and denying suspension of deportation. After considering all the facts in the case at that time, we denied suspension of deportation as a matter of administrative discretion.

Counsel's motion sets forth no matters of which we were unaware at the time our previous decision was rendered. It is crystal clear that

> Congress intended to greatly restrict the granting of suspension of deportation by the change of phraseology which was used in Section 244(a) of the Immigration and Nationality Act as well as the Congressional comment at the time this provision was enacted. We indicated in our previous order that the deportation of the respondents would result in a serious economic detriment to their citizen minor child, and we do not question that the respondents have established the statutory requirements for suspension of deportation under Section 19(c) of the Immigration Act of 1917, as amended.
>
> * * *
>
> Upon our further review of the cases of the two respondents, we adhere to our previous decision that suspension of deportation should be denied as a matter of administrative discretion and counsel's motion will, therefore, be denied.

Taken into custody on warrants of deportation, petitioners sued out writs of habeas corpus alleging that the Attorney General had abused his discretion in denying their applications for suspension of deportation (R. 3-4). The District Court held that it had no power to overturn the exercise of discretion by the Board of Immigration Appeals, acting for the Attorney General, since the Board had neither abused its discretion nor acted capriciously (Pet. 28; R. 7). The District Court stated that, in exercising its discretion under the Immigraton Act of 1917, the Board could properly take into account the new and stricter standards relative to suspension of deportation which Congress laid down in the Immigration and Nationality Act of 1952 (Pet. 27; R. 6-7).

In affirming the dismissal of the writ by the District Court, the Court of Appeals held that the reference to the 1952 Act in the second opinion of the Board of Immigration Appeals (*supra,* pp. 9-10) did not mean that the Board felt that the scope of its discretionary power was restricted by that Act, but rather that its exercise of discretionary power was consonant with the policy of the Act (Pet. 37; R. 31).

ARGUMENT

Although petitioners' contentions here are couched in terms of insufficient evidence to support the denial of suspension and the resulting denial of due process (Pet. 11-21), it is evident that their real complaint is against the Board's reference, in its opinion denying reconsideration, to the requirements for suspension set forth in the 1952 Act and the apparent influence of those new requirements upon the Board's thinking in exercising its discretion to deny suspension. There was no conflict in the evidence before the Board and it is not contended that the Board did not consider all the facts. Nor is there any dispute concerning petitioners' right to have their applications for suspension considered and determined under the eligibility standards of the 1917 Act. The Board recognized that right and specifically held that petitioners were eligible for suspension under that Act. (*Supra,* pp. 8-10; Pet. App. A, 26; Pet. App. B, 31).

The Board's first decision of March 18, 1954, set forth the factors and merits of the petitioners' cases upon which it rested its exercise of discretion: both were aliens illegally residing in this country who had

entered as seamen and had been here only a short time; they had no other dependents or close family ties here; and the husband might be able to obtain work as a Greek seaman and earn $85 monthly (R. 16). The hearing officer had added that to allow petitioners to stay would deprive others of visas under already oversubscribed quotas (R. 10-11). These discussions by the agencies charged with responsibility for deciding petitioners' applications, and the Board's statement that "the granting or withholding of maximum discretionary relief depends on the factors and merits in each individual case" (R. 16), demonstrate that the decisions denying suspension were in truth an exercise of the discretionary authority granted by the 1917 Act, without reference to the new requirements for eligibility for suspension established by the intervening 1952 Act.

The Board's mention, in its later opinion denying reconsideration, of the purpose of Congress in the 1952 Act to "restrict the granting of suspension" (R. 18; *supra*, p. 10) does not indicate, as petitioners and the dissenting judge below (Pet. 38-40) contend, that the Board, contrary to the savings clause (§ 405(a)) of the 1952 Act, decided petitioners' applications on the basis of the new standards for eligibility prescribed by Section 244(a) of that Act. The Board did *not* say that it was bound by the new Act. At most, the reference indicates that Section 244(a) was a factor which the Board considered in exercising its discretion under the standards of the 1917 Act, once it had decided, as it clearly did, that petitioners were statutorily eligible for suspension under the 1917 Act.

There was no impropriety, much less illegality, in taking this factor into account in the course of exercising discretion whether or not to suspend. This Court recently pointed out in *Jay* v. *Boyd*, No. 503, O.T. 1955, decided June 11, 1956, after the decision below (slip opinion, pp. 7-9):

> * * * However, Congress did not provide statutory standards for determining who, among qualified applicants for suspension, should receive the ultimate relief. That determination is left to the sound discretion of the Attorney General. The statute says that, as to qualified deportable aliens, the Attorney General "may, in his discretion" suspend deportation. *It does not restrict the considerations which may be relied upon* or the procedure by which the discretion should be exercised. Although such aliens have been given a right to a discretionary determination on an application for suspension, cf. *Accardi* v. *Shaughnessy*, 347 U.S. 260, a grant thereof is manifestly not a matter of right under any circumstances, but rather is in all cases a matter of grace. Like probation or suspension of criminal sentence, it "comes as an act of grace," *Escoe* v. *Zerbst*, 295 U.S. 490, 492, and "cannot be demanded as a right," *Berman* v. *United States*, 302 U.S. 211, 213. And this unfettered discretion of the Attorney General with respect to suspension of deportation is analogous to the Board of Parole's powers to release federal prisoners on parole. [Emphasis added.][1]

[1] Although the *Jay* case involved suspension of deportation under the 1952 Act, the grant of discretionary power under the 1917 Act was substantially the same (see fn. 15 of the *Jay* slip opinion, pp. 7-8).

granted. In reaching this conclusion, he considered the brevity of their period of residence here and the absence of relatives here other than their infant son. However, he concluded that they should be permitted to depart voluntarily rather than being subjected to deportation (R. 9).

On appeal, the Board of Immigration Appeals agreed with the hearing officer. On the basis of the entire record, the Board held that suspension of deportation was not warranted even though petitioners had brought themselves within the class of persons as to whom there was authority to grant that relief. The Board said (R. 13–14):

> * * * the granting or withholding of maximum discretionary relief depends on the factors and merits in each individual case, and is a matter of administrative discretion [citing *Weddeke* v. *Watkins*, 166 F. 2d 369 (C. A. 2) and *Kaloudis* v. *Shaughnessy*, 180 F. 2d 489 (C. A. 2)]. We have carefully examined the facts and circumstances in the instant case and we find that the granting of the maximum relief is not warranted by the record in the case. * * *

Thereafter, the petitioners filed with the Board of Immigration Appeals a motion for reconsideration on the ground that suspension was appropriate in order to protect the interests of the infant son who was an American citizen. The Board denied this motion, stating (R. 15–16):

> * * * * *
>
> Counsel's motion sets forth no matters of which we were unaware at the time our previ-

The analogy the majority of the court below drew between the Board's consideration of the policy of the 1952 Act in exercising its discretion and the propriety of a "wise judge's" consideration of "contemporary *mores* and public opinion" in refusing probation and imposing a prison sentence (Pet. 36-37) is particularly apt in view of the *Jay* decision which also likened suspension of deportation to "probation or suspension of criminal sentence", each being "an act of grace". Like the court below in this case, this Court cited Judge Learned Hand's opinion in *United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489, 491, in explaining that, like a judge's discretion to grant or refuse probation, the Attorney General's discretionary authority with respect to suspension of deportation is "unfettered" (*Jay* slip opinion, fn. 16, p. 8). We think the *Jay* decision confirms the holding below that the Board could properly consider the policy of the 1952 Act in the exercise of its discretionary authority under the 1917 Act.

Finally, the *Jay* ruling—the latest holding in this area—renders unavailing petitioners' claim (Pet. 11) that the decision below is in conflict with earlier decisions of the Second Circuit and with *United States* v. *Menasche*, 348 U.S. 528. In any event, there is no conflict. In *Mastrapasqua* v. *Shaughnessy*, 180 F. 2d 999 (C.A. 2), the Board did not exercise its discretion at all, but denied suspension because the alien was one of a class of aliens whom the Attorney General had earlier said should be denied discretionary relief. *United States ex rel. Zacharias* v. *Shaughnessy*, 221 F. 2d 578 (C.A. 2), involved a situation where the Board

> ous decision was rendered. It is crystal clear that Congress intended to greatly restrict the granting of suspension of deportation by the change of phraseology which was used in Section 244 (a) of the Immigration and Nationality Act as well as the Congressional comment at the time this provision was enacted. We indicated in our previous order that the deportation of the respondents would result in a serious economic detriment to their citizen minor child, and we do not question that the respondents have established the statutory requirements for suspension of deportation under Section 19 (c) of the Immigration Act of 1917, as amended.
>
> * * * * *
>
> Upon our further review of the cases of the two respondents, we adhere to our previous decision that suspension of deportation should be denied as a matter of administrative discretion and counsel's motion will, therefore, be denied.

Taken into custody on warrants of deportation, petitioners sued out writs of habeas corpus alleging that there had been an abuse of discretion in the denial of their applications for suspension of deportation (R. 2–4). The district court upheld the order of the Board of Immigration Appeals, finding that it had neither abused its discretion nor acted capriciously in denying petitioners' application for suspension of deportation (R. 2–6). The district court noted that, in exercising discretion under the Immigration Act of 1917, the Board could properly take into account the subsequently enacted Immigration and Nationality Act of 1952 (R. 4–6).

applied the *eligibility* standards of the 1952 Act, although the savings clause of that Act called for application of the eligibility standards of the prior law. Nor is there any inconsistency with *Menasche*, for the Board expressly adjudged petitioners' applications for suspension under the eligibility standards prescribed by the 1917 Act (*supra*, pp. 9-10, 11).

CONCLUSION

We submit that the intervening *Jay* decision of this Court is dispositive of the issue in this case, and also that the holding below is correct and no conflict of decisions is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1956.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 205

UNITED STATES OF AMERICA, EX REL. ANASTASIOS HINTOPOULOS AND ELIZABETH HINTOPOULOS, PETITIONERS

v.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION AT THE PORT OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. 16–27) are reported at 238 F. 2d 705. The opinion of the District Court for the Southern District of New York (R. 2–6) is reported at 133 F. Supp. 433.

JURISDICTION

The judgment of the Court of Appeals was entered on May 9, 1956 (R. 27). The petition for a writ of certiorari was filed on June 27, 1956, and was granted on October 8, 1956 (R. 28). 352 U. S. 819.

The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether, in denying petitioners' applications for suspension of deportation governed by the Immigration Act of 1917, the Board of Immigration Appeals properly exercised the discretion granted by that Act or acted improperly in referring to the policy governing the disposition of applications under the 1952 Act.

STATUTES INVOLVED

Section 19 (c) of the Immigration Act of 1917, 39 Stat. 889, as amended by the Act of June 28, 1940, c. 439 (54 Stat. 671, 672), the Act of December 8, 1942, c. 697 (56 Stat. 1044), and the Act of July 1, 1948, c. 783 (62 Stat. 1206), 8 U. S. C. (1946 ed., Supp. V) 155 (c) provided:

> (c) In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is

residing in the United States upon the effective date of this Act. If the deportation of any alien is suspended under the provisions of this subsection for more than six months, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. These reports shall be submitted on the 1st and 15th day of each calendar month in which Congress is in session. If during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If prior to the close of the session of the Congress next following the session at which a case is reported, the Congress does not pass such a concurrent resolution, the Attorney General shall thereupon deport such alien in the manner provided by law. Deportation proceedings shall not be canceled in the case of any alien who was not legally admitted for permanent residence at the time of his last entry into the United States, unless such alien pays the Commissioner of Immigration and Naturalization a fee of $18 (which fee shall be deposited in the Treasury of the United States as miscellaneous receipts). Upon the cancellation of such proceedings in any case in which fee has been paid the Commissioner shall record the alien's admission for permanent residence as of the date of his last entry into the United States and the Secretary of State shall, if the alien

was a quota immigrant at the time of entry and was not charged to the appropriate quota, reduce by one the immigration quota of the country of the alien's nationality as defined in section 12 of the Act of May 26, 1924 (U. S. C., title 8, sec. 212), for the fiscal year then current at the time of cancellation or the next following year in which a quota is available: *Provided*, That no quota shall be reduced by more than 50 per centum in any fiscal year.[1]

[1] The corresponding sections of the Immigration and Nationality Act of 1952, Sections 244 (a) (5), (c) and (d), 66 Stat. 214–216, 8 U. S. C. 1254 (a) (5), (c) and (d), provide:

"SEC. 244. (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—

* * * * *

"(5) is deportable under paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17) or (18) of section 241 (a) for an act committed or status acquired subsequent to such entry into the United States or having last entered the United States within two years prior to, or at any time after the date of enactment of this Act, is deportable under paragraph (2) of section 241 (a) as a person who has remained longer in the United States than the period for which he was admitted; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence.

* * * * *

"(c) Upon application by any alien who is found by the Attorney General to meet the requirements of paragraph (4) or (5)

Section 405 (a) of the Immigration and Nationality Act of 1952, 66 Stat. 280, 8 U. S. C. 1101, note, provides:

> SEC. 405. (a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any * * * proceeding which shall be valid at the time this Act shall take effect; or to affect any * * * proceedings, civil or criminal, brought * * * at the time this Act shall take effect;

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of subsection (a) of this section, the Attorney General may in his discretion suspend deportation of such alien. If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. Such reports shall be submitted on the first and fifteenth day of each calendar month in which Congress is in session. If during the session of the Congress at which a case is reported, or, prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If within the time above specified the Congress does not pass such a concurrent resolution, or if either the Senate or House of Representatives passes a resolution stating in substance that it does not favor the suspension of the deportation of such alien, the Attorney General shall thereupon deport such alien in the manner provided by law.

"(d) Upon the cancellation of deportation in the case of any alien under this section, the Attorney General shall record the alien's lawful admission for permanent residence as of the date the cancellation of deportation of such alien is made, and the Secretary of State shall, if the alien was classifiable as a quota immigrant at the time of entry and was not charged to the appropriate quota, reduce by one the quota of the quota area to which the alien is chargeable under section 202 for the fiscal year then current at the time of cancellation or the next following year in which a quota is available. No quota shall be so reduced by more than 50 per centum in any fiscal year."

> but as to all such * * * proceedings * * * the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * * An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended * * * which is pending on the date of enactment of this Act [June 27, 1952] shall be regarded as a proceeding within the meaning of this subsection.

STATEMENT

This is a habeas corpus proceeding to test the validity of an order of the Board of Immigration Appeals denying petitioners' requests for suspension of deportation under the provisions of Section 19 (c) of the Immigration Act of 1917 (*Supra*, pp. 2–4). The facts, which are undisputed, are as follows:

Petitioners, who are husband and wife, are aliens[2] who entered this country legally, but for a limited stay, as seamen, the wife in July 1951, and the husband in August of the same year (R. 9–10). The wife testified at one point that she knew she was pregnant at the time of her admission and wished to remain until her child was born. Later, she stated that at the time of her entry she intended to be examined by a doctor to determine whether she could continue at sea. She stated she intended to follow

[2] The hearing officer determined that both aliens were Greek citizens (R. 7). The Board of Immigration Appeals found the husband to be Greek and the wife a subject of the Soviet Union (R. 11–12). The court below refers to them as Greek (R. 17), as do petitioners in their brief (Pet. Br. 5). The nationality of the petitioners is not material to the issues before this Court.

the doctor's advice as to the length of time she should remain in the United States (R. 8). Her husband stated that he left the ship on a later trip because of his wife's illness, with the intent to remain with her until she recovered (R. 7–8). Without making applications for extensions, both aliens overstayed the time permitted them, that is, the time the ship remained in port but not over 29 days.

In November 1951, their child was born in the United States and is a citizen of the United States. In January 1952, petitioners disclosed their presence here to the authorities by filing an application with the New York office of the Immigration and Naturalization Service seeking suspension of deportation (R. 9). Deportation proceedings were instituted in May 1952, and a hearing was held to determine whether petitioners were deportable and if so whether deportation should be suspended in accordance with their applications under Section 19 (c).

On the undisputed facts, both aliens were found deportable and that finding has never been challenged (R. 10). On the issue of suspension of deportation, the hearing officer first noted the fact that the aliens were of good moral character and that their child, a citizen of the United States, would suffer an economic hardship if his parents were deported (R. 8–9). The father was earning $64 a week here (R. 9) and could expect to earn only $85 a month if deported (R. 13). In spite of the fact that the aliens fulfilled the statutory conditions of eligibility for suspension, the hearing officer concluded that, on the facts of the case, discretionary relief should not be

In affirming the dismissal of the writ of habeas corpus by the district court, the court of appeals held that the reference to the 1952 Act by the Board of Immigration Appeals did not mean that the Board felt that the scope of its discretionary power was restricted by the Act, but rather that it was appropriate for it to consider the policy of that Act in exercising its discretion (R. 21). Judge Frank dissented, stating that the reference of the Board to the Congressional intent in passing the Immigration and Nationality Act of 1952 introduced an improper basis for denying suspension since the savings clause of the 1952 Act required that the Board's exercise of discretion be governed by the 1917 Act (R. 23–26).

SUMMARY OF ARGUMENT

Without contesting the fact that they were subject to deportation, petitioners sought through habeas corpus to test the validity of orders denying their applications for suspension of deportation. The hearing officer and the Board of Immigration Appeals refused to suspend deportation on the grounds that, although petitioners fell within the class as to whom Congress permitted suspension, they had not established facts which were persuasive that the discretion to give that relief should be exercised. Petitioners attack that order on the grounds: that, under the applicable law, the Attorney General was required to suspend deportation; that there was either a refusal to exercise or an abuse of discretion; and that the Board improperly relied on the standards applicable to the 1952 statute when the case was governed

by the 1917 Act. Both courts below refused to reverse the administrative decision.

I

Petitioners argue that the word "may" in the statute—referring to the authority to grant suspension of deportation—means "shall" when an economic detriment to an American citizen is involved. But in the same statute Congress has used "may" and "shall" discriminatingly to mean either permissive or compulsive action. The testimony before the Congressional hearings, the debates, and the reports all indicate that discretion was granted. The lower courts have always so assumed, and this Court in *Jay* v. *Boyd,* 351 U. S. 345, 353, has suggested that the discretionary element, which is undoubtedly incorporated in the 1952 Act, is not a change in substance from the earlier law. It therefore appears certain that petitioners had no *right* to suspension, but only the right to have the Board of Immigration Appeals exercise its discretion in considering their applications.

II

The opinions of the hearing officer and of the Board of Immigration Appeals show that both did in fact give full consideration to the undisputed facts in the case. Petitioners are man and wife who were serving as seamen at the time of entry. The wife was pregnant and landed to see her doctor; she then stayed. The husband overstayed his leave on the next trip. The baby, an American citizen by birth, was born six months after, and two months later petitioners made

application for suspension of deportation. The prime consideration in denying relief was that the family had really not established roots in this country so that it would be unfair to permit them to remain, thus deducting from the Greek quota the chance for two immigration visas otherwise available for aliens who sought to comply with our law. The courts below, quite properly, we submit, held that there was no abuse of discretion.

III

Although there is no dispute that the 1917 Act governed these applications, and although the administrative action was clearly predicated on that Act, the dissenting judge in the court below and petitioners find a defect in the Board's action in that in the exercise of its discretion it made reference to the policy enunciated by Congress for administration of the 1952 Act. The district court and the majority of the court below found that such reference was not improper since Congress must have intended the discretion to be exercised in the light of conditions existing at the time action was taken, rather than on the basis of history. Strong support for this position is to be found in the fact that administrative action on applications for suspension of deportation is subject to Congressional review and it would be a futile absurdity for the Attorney General to disregard current Congressional opinion. Basically, the Board of Immigration Appeals accepted the direction of Congress as laid down in the 1917 Act but applied it with consideration of the present circumstances. This, we submit, was not error.

ARGUMENT

This case involves two admittedly deportable aliens who are challenging the administrative denial to them of the privilege of suspension of deportation, a privilege which this Court has recently compared to those of probation and suspension of sentence in criminal cases, the grant of which comes, not as a matter of right, but as an act of grace. *Jay* v. *Boyd*, 351 U. S. 345, 354. Judicial review of this administrative decision is confined to the narrow issues of whether there has been either an abuse of discretion, a total failure to exercise the discretion granted, or the application of a mistaken standard in the exercise of discretion. See *e. g., United States ex rel. Bruno* v. *Sweet*, 235 F. 2d 801, 804–805 (C. A. 8); *Melachrinos* v. *Brownell*, 230 F. 2d 42, 45 (C. A. D. C.); *United States ex rel. James* v. *Shaughnessy*, 202 F. 2d 519, 520 (C. A. 2), certiorari denied, 345 U. S. 969; *United States ex rel. Adel* v. *Shaughnessy*, 183 F. 2d 371, 372 (C. A. 2); *United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489, 490–491 (C. A. 2); *United States ex rel. Weddeke* v. *Watkins*, 166 F. 2d 369, 373 (C. A. 2), certiorari denied, 333 U. S. 876.

Petitioners argue (1) that, as to aliens within the class as to whom suspension of deportation may be granted, it must be granted if deportation would result in a serious economic detriment to a citizen who is a minor child of the alien (Pet. Br. 20–25); (2) that there was no evidence to support an exercise of discretion against suspension (Pet. Br. 14–20); and (3) that improper reliance was placed on the policy of the 1952 Act which was not applicable to petitioners'

applications governed by the 1917 Act (Pet. Br. 12–14).

I. The statute gives the Attorney General discretionary power to grant or refuse suspension of deportation to aliens in the prescribed class.

Since in this case the deportation proceedings and the applications for suspension in connection therewith preceded the Immigration and Nationality Act of 1952, having been commenced in May 1952, the Savings Clause of that Act (Section 405, 8 U. S. C. 1101, *supra*, pp. 5–6) reserves to the petitioners the right to proceed under the earlier statute. Specifically, an application for suspension is designated as a proceeding under that section. Therefore, there is no dispute that section 19 (c) of the Immigration Act of 1917 (as amended) (*supra*, pp. 2–4) controls.

It is also not in dispute that the authority vested in the Attorney General by section 19 (c) has been validly delegated to the Board of Immigration Appeals so that, so far as this case is concerned, orders issued by the Board have the same legal effect as though they have been issued by the Attorney General. 8 C. F. R., 1949 ed., sec. 90.3 (c). *Accardi* v. *Shaughnessy*, 347 U. S. 260, 266.

Prior to 1940, the immigration laws contained no provision for relief in the case of a deportable alien. Unless Congress passed a private relief bill on his behalf, a deportable alien, however deserving, was required under the law to be expelled. Then in 1940 the Alien Registration Act (54 Stat. 670, 672) added section 19 (c) to the Immigration Act of 1917 providing for suspension of deportation. As amended in 1942 and 1948 in respects which are immaterial

met the prerequisites for inclusion in the class to whom suspension was available. Furthermore, the standard applied ("serious economic detriment") was that set forth in the earlier Act. Unless the Attorney General's discretion was to be based on historical accident, rather than on current developments, there was no departure from the provisions of the earlier law.

CONCLUSION

For the foregoing reasons, we respectfully submit that the decision of the court below should be affirmed.

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here, this statute provided in pertinent part, 8 U. S. C., (1946 ed., Supp. V), 155 (c):

> In the case of any alien * * * who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may * * * suspend deportation * * * if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act [July 1, 1948].

The statute went on to provide that, if the deportation of an alien was suspended for more than six months, the pertinent facts and law were to be reported in detail to Congress. Deportation would be canceled unless Congress passed a concurrent resolution stating in substance that it did not favor the suspension of deportation.[3]

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[3] In 1942, Congress made a change in the date when the Attorney General was required to report any grant of suspension. 56 Stat. 1044.

In 1948, Congress enlarged the class of deportable aliens eligible for suspension of deportation in the discretion of the Attorney General to include those who had resided continuously in the United States for seven years or more upon the effective date of the enactment and certain aliens theretofore ineligible by reason of race. It also changed the procedure of congressional confirmation of the action of the Attorney General in cases in which he suspended deportation for more than 6 months by requiring affirmative congressional action before deportation proceedings could be finally canceled (*supra*, p. 3). 62 Stat. 1206. However, the discretion of the Attorney General was left unchanged in these subsequent amendments to the 1940 addition.

In construing the comparable provision of the 1952 Act (Section 244 (a) (5), 8 U. S. C. 1254 (a) (5), *supra*, p. 4), this Court recognized that under that statute the determination of whether to suspend was left to the sound discretion of the Attorney General, *Jay* v. *Boyd*, 351 U. S. 345, 353, and that the 1952 Act differed from its predecessor in this respect only in that the later statute was more specific in making the grant discretionary. *Id.* p. 353, fn. 15. As we point out below (*infra*, pp. 18–20), the courts have consistently interpreted the 1917 Act as giving the Attorney General discretion. However, petitioners argue that the word "*may* * * * suspend deportation * * *" should be read as "*shall* * * * suspend deportation * * *" (Pet. Br. 21–22).

The choice of the word "may" in section 19 (c), vesting this authority in the Attorney General, is in itself an indication that Congress did not intend that the grant of suspension should be automatic in the case of aliens of good moral character whose deportation would result in the defined hardship. The mandatory language "shall" was used liberally throughout section 19 (c) when Congress did not wish to leave action to the discretion of the Attorney General.[4]

[4] For example, section 19 (c) (*supra*, pp. 2–4) provided that: in the event deportation was suspended by the Attorney General for more than six months "* * * a complete and detailed statement of the facts and pertinent provisions of law in the case *shall* be reported to the Congress with the reasons for such suspension * * *"; in the event that Congress passed, within a certain time, a concurrent resolution favoring such suspension, "* * * the Attorney General *shall* cancel deportation proceedings * * *"; in the event that Congress did not pass such a concurrent resolution, "* * * the Attorney General *shall* thereupon deport such alien * * *." [Italics added.]

The legislative history supports the conclusion that the choice of the permissive word "may," rather than the mandatory word "shall," was not a matter of chance. A House Report in 1934, on an earlier draft of legislation to provide for suspension of deportation, states:

> It will be observed that *even if the alien qualifies* under one of the six classes enumerated *favorable action is left to the discretion of the Secretary of Labor* [then in charge of these matters]. * * * [Italics added.] H. Rep. 1772, Part 2, 73rd Cong., 2d Sess. (1934), p. 3.

Mr. Hobbs, the House Manager of the 1940 bill, in explaining to Mr. Celler the provision made for hardship cases, stated (86 Cong. Rec. 9032 (1940)):

> These so-called hardship cases are taken care of in this way. Any alien who is illegally in this country is given a chance to convince the Attorney General that there would be an economic loss to a citizen of the United States if he should be deported. *Then, if and when he shows, to the satisfaction of the Attorney General that that is so,* that he has a wife—or in the case of a woman, a husband—who will suffer by reason of the deportation, *the Attorney General may, if, in his sound discretion,* after full hearing, he so determines, *order the suspension* or cancelation of the deportation order; provided, however, that he must report every case to the Congress; and if the Congress, by concurrent resolution, vetoes his decision, of course the deportation order stands. [Italics added.]

Congressional comment since the addition in 1940 of section 19 (c) to the Immigration Act of 1917 shows that it has consistently been the thought of Congress that suspension of deportation under section 19 (c) was not to be automatic, even in the case of aliens who met the statutory qualifications, but discretionary with the Attorney General.

In 1947, when a congressional committee was considering proposed amendments to the suspension statute, the whole understanding of very broad discretion was openly laid before the committee by Mr. Shaughnessy, special assistant to the Commissioner on Immigration and Naturalization, Department of Justice. He stated:[5]

> None of the provisions of this bill is mandatory upon the Attorney General. He has the discretion in every single case.

In its study of the laws preparatory to the 1952 revision of the immigration and naturalization laws, the Senate Judiciary Committee stated (S. Rep. No. 1515, 81st Cong., 2d Sess., p. 600):

> Suspension of deportation is a discretionary action. Technical compliance by the alien with the former eligibility requirements does not necessitate a conclusion that he will be granted suspension of deportation. * * *

Following the plain mandate of the statutory language and history, the courts have consistently recognized that suspension of deportation was

[5] Hearings before the Subcommittee on Immigration and Naturalization of the House Judiciary Committee, 80th Cong., 1st Sess., on H. R. 245, H. R. 671, H. R. 1115 and H. R. 2933 (1947), p. 35.

intended to be a matter of executive grace, subject at most to very limited judicial review for failure to exercise discretion or for misconception of the applicable law. As stated by Judge Learned Hand in *United States ex rel. Kaloudis* v. *Shaughnessy,* 180 F. 2d 489, 491 (C. A. 2), the "power of the Attorney General to suspend deportation is a dispensing power, like a judge's power to suspend the execution of a sentence, or the President's to pardon a convict. It is a matter of grace, over which courts have no review, unless—as we are assuming—it affirmatively appears that the denial has been actuated by considerations that Congress could not have intended to make relevant." Similarly, in *United States ex rel. Adel* v. *Shaughnessy,* 183 F. 2d 371, 372 (C. A. 2), it was held: "The courts cannot review the exercise of such discretion; they can interfere only when there has been a clear abuse of discretion or a clear failure to exercise discretion." And in *Sleddens* v. *Shaughnessy,* 177 F. 2d 363, 364 (C. A. 2), the court held that the "relator's claim in the habeas corpus proceedings that he was entitled to suspension of deportation was properly held to be without merit because such suspension was a matter of discretion on the part of the Attorney General which the court was without power to review." See also *United States ex rel. Weddeke* v. *Watkins,* 166 F. 2d 369 (C. A. 2), certiorari denied, 333 U. S. 876; *United States ex rel. Walther* v. *District Director of Immigration and Naturalization,* 175 F. 2d 693, 694 (C. A. 2); *United States ex rel. Zeller* v. *Watkins,* 167 F. 2d 279, 282 (C. A. 2); *United States ex rel. Baetsch* v. *Watkins,*

175 F. 2d 245, 247 (C. A. 2); *Arakas* v. *Zimmerman*, 200 F. 2d 322 (C. A. 3).

II. On the admitted facts of this case there was no failure to exercise, or abuse of, discretion in the denial of suspension.

We turn now to a consideration of the facts of this case to determine whether the broad discretion of the Attorney General under section 19 (c) of the 1917 Act was either not exercised or abused, as alleged by petitioners (Pet. Br. 12–20).

It is clear from a reading of the decisions of the hearing officer and the Board of Immigration Appeals that they did consider the facts and circumstances of these particular cases and based their decisions upon such consideration (R. 7–16). The hearing officer discussed at length the facts of petitioners' cases (R. 7–9). The Board of Immigration Appeals did likewise and so stated (R. 14):

> * * * We have carefully examined the facts and circumstances in the instant case and we find that the granting of the maximum relief is not warranted by the record in the case * * *.

In its later decision of May 5th, the Board referred to its earlier decision of March 18th and stated (R. 15, 16):

> * * * After considering all the facts in the case at that time, we denied suspension of deportation as a matter of administrative discretion.
>
> Counsel's motion sets forth no matters of which we were unaware at the time our previous decision was rendered. * * *

> Upon our further review of the cases of the two respondents, we adhere to our previous decision that suspension of deportation should be denied as a matter of administrative discretion and counsel's motion will, therefore, be denied. * * *

The decision of the Board of Immigration Appeals in petitioners' cases is in marked contrast to that involved in *Mastrapasqua* v. *Shaughnessy*, 180 F. 2d 999 (C. A. 2), cited by the dissenting judge below (R. 24) and petitioners (Pet. Br. 24). In that case the Board of Immigration Appeals did not exercise its discretion at all, but said it was bound by the Attorney General's decision in another case involving a similar factual situation of an Italian alien whose eligibility for suspension of deportation was due to continued residence here resulting from inability to enforce his deportaton order to Italy during the pendency of World War II. The Court of Appeals in *Mastrapasqua* remanded the case with directions to the District Court to order the release of Mastrapasqua unless, within a reasonable time, the Immigration and Naturalization Service or the Board of Immigration Appeals exercised its own discretion on the particular facts of that case.

The hearing officer here based his decision on the fact that petitioners had not established in this country roots or ties which they would have to break if deported, and had presented no special circumstances, other than the fact of the birth of their son, which would warrant extending to them the privilege of remaining. While this birth gave them an eligibility for the relief of suspension, the hearing officer did not

consider it alone to be sufficient reason to permit them to stay, in derogation of the rights of others from Greece who have been patiently waiting in line for their turn to enter this country.[6] Cf. *Melachrinos* v. *Brownell*, 230 F. 2d 42, 44–45 (C. A. D. C.). The hearing officer also noted that petitioners did not report their presence in the United States until after the birth of their child gave them a foothold in this country. All of these considerations are reasonable and relevant in view of the discretionary and gratuitous nature of the relief sought.

In reviewing the decision of the hearing officer, the Board of Immigration Appeals also noted that petitioners did not seek to obtain an extension of their period of stay as seamen, although their testimony showed they intended to stay for an indefinite period when they left their ships (R. 12.) The Board took account of the facts that they had been in this country for a period of less than three years, and had no close family ties or any dependents other than their child of the age of two and one-half years (R. 13). It commented upon the fact that the male petitioner could possibly obtain work as a Greek seaman for about $85 monthly. Noting that the granting or withhold-

[6] The Immigration Act of 1917, as amended (*supra*, pp. 3–4), provided that, upon cancellation of deportation of any alien under the provisions for suspension of deportation, the immigration quota of his country should be reduced by one for that year or the next following year in which a quota was available (provided that no quota be reduced by more than 50 per centum in any fiscal year). Petitioners' statement (Pet. Br. 9) that suspension in their case would not adversely affect anyone is in error; we are informed by the State Department that cancellations of deportation orders relating to Greek aliens may be charged against the quota for current or upcoming years.

ing of maximum discretionary relief depends on the factors and merits of each individual case (R. 13) and stating that it had "carefully examined the facts and circumstances in the instant case" (R. 14), the Board on March 18, 1954, found that the granting of maximum relief to petitioners was "* * * not warranted by the record * * *" and dismissed the appeals (R. 14). These were the same considerations relied upon by the hearing officer, and, as we have already commented (*supra*, pp. 21–22), were both reasonable and relevant to the nature of the relief sought.

Although each case stands on its own facts, it is significant that the absence of "roots" in this country was upheld as a basis for the exercise of discretion against suspension in *Melachrinos* v. *Brownell*, 230 F. 2d 42 (C. A. D. C.), where the court stated at 44:

> It seems to us that one element to be determined by the Attorney General in weighing the question as to whether or not his discretion should be exercised is whether, if at all, the alien has during his residence here become a part of this country, with his roots firmly fixed herein. Mere residence and good moral character alone may not be sufficient.

Petitioners cite cases from the files of the Immigration and Naturalization Service in which suspension was allowed by the Board (Pet. 14–17). All

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[7] Meeting a similar argument advanced in *Acqaidi* v. *Shaughnessy*, 347 U. S. 260, this Court disposed of it in a footnote at page 264 as follows:

"The first ground was that 'in all similar cases the Board of Immigration Appeals has exercised favorable discretion and its refusal to do so herein constitutes an abuse of discretion.' This is a wholly frivolous contention, adequately disposed of by the Court of Appeals."

but two of these are the same cases cited in footnotes 17 to 22 of Senate Report 1515 (81st Cong., 2d Sess., p. 597) as examples of the interpretation given to the term "serious economic detriment" contained in section 19 (c) to determine if the aliens were eligible for the relief sought thereunder. The files of those cases which we have been able to obtain reveal additional factors of long residence, family ties, or economic distress to numerous dependent American citizens, that are not present here, and which account for the grant of suspension accorded in those cases:

In the case of Emilio Consigliero, immigration file number A-2146468, decided by the Board on June 11, 1947, the alien involved had been in this country for seven years, had married a native-born American citizen, and had two children born here.

In the case of Mariangoula T. Tsolainos, immigration file number A-6250408, decided on November 25, 1949, the alien was married to a Greek citizen, who entered this country as a diplomat twenty-five years previously and was a legally resident alien. Her mother and two sisters were in this country, as well as numerous close in-laws.

In the case of William Rybicki, immigration file number 56111/780, decided July 21, 1944, the alien had resided in this country for seventeen years and was married to a naturalized citizen.

In the case of Pedro Palacio, immigration file number 56093/577, decided March 30, 1943, the alien had resided here for a total of 24 years, was married to an American citizen, and had eight children, all American citizens born here.

In the case of Rosario Mendez de Vargas, immigration file number 55930/335, decided March 31, 1943, the alien had resided in this country for fifteen years and had five minor children, all citizens of this country by birth.

In the case of Adela Monterroso Esquivel, immigration file number 56050/380, decided May 15, 1943, the alien had resided in this country for seventeen years and had two American-born children.

All these cases are clearly distinguishable on their facts, but, even if they were not, we submit that there has not here been such an abuse of the "unfettered discretion" (*Jay* v. *Boyd*, 351 U. S. 345, 354) of the Attorney General as to justify the granting of the writ.

III. The reference to the policy underlying the 1952 Act does not invalidate the order made pursuant to the 1917 Act.

As pointed out above (*supra*, p. 14), it is not disputed that the applications for suspension here involved were governed by the provisions of section 19 (c) of the 1917 Act. There was no confusion during the administrative proceedings as to the law which controlled. The denial by the hearing officer was based on an exercise of discretion whereas, if he had considered the 1952 law applicable, he would have had no power to grant suspension since under that law residence often years was a prerequisite.[8] The head-

[8] The eligibility requirements in the 1917 Act were proof of good moral character for the preceding five years and serious economic detriment to a citizen or legally resident alien who was the spouse, parent, or minor child of such deportable alien (*supra*, p. 2). In the 1952 Act these eligibility requirements, as applicable, to

note to the first opinion of the Board of Immigration Appeals refers to the "Act of 1917" (R. 11), and its opinion, like that of the hearing officer, is entirely inconsistent with an application of the 1952 Act. And finally, reliance on the 1917 Act was specific in the Board's opinion on rehearing when it stated (R. 15):

> * * * We indicated in our previous order that the deportation of the respondents would result in a serious economic detriment to their citizen minor child, and we do not question that the respondents have established the statutory requirements for suspension of deportation under Section 19 (c) of the Immigration Act of 1917, as amended. * * *

Moreover, the Board considered the "serious economic detriment" to the American citizen, petitioners' infant son (R. 13), which is language quoted from the 1917 Act, rather than "exceptional and extremely unusual hardship", which is the language of the 1952 Act.

The dissenting judge in the court below (R. 24) and petitioners (Pet. Br. 12–14) consider that the Board of Immigration Appeals applied an improper standard by taking into account the Congressional policy underlying the 1952 Act. This argument is

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those aliens who, like petitioners, have remained longer in the United States than the period for which they were admitted, are a physical presence in the United States for a continuous period of not less than ten years; proof of good moral character for that period; and a finding that the alien is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence (*supra*, p. 4).

based on language used by the Board in its disposition of petitioners' application for rehearing. The Board stated (R. 15-16):

> * * * On March 18, 1954, we dismissed the appeals of the respondents from the hearing officer's decision granting voluntary departure and denying suspension of deportation. After considering all the facts in the case at that time, we denied suspension of deportation as a matter of administrative discretion.
>
> Counsel's motion sets forth no matters of which we were unaware at the time our previous decision was rendered. It is crystal clear that Congress intended to greatly restrict the granting of suspension of deportation by the change of phraseology which was used in Section 244 (a) of the Immigration and Nationality Act as well as the Congressional comment at the time this provision was enacted. We indicated in our previous order that the deportation of the respondents would result in a serious economic detriment to their citizen minor child, and we do not question that the respondents have established the statutory requirements for suspension of deportation under Section 19 (c) of the Immigration Act of 1917, as amended.
>
> * * * * *
>
> Upon our further review of the cases of the two respondents, we adhere to our previous decision that suspension of deportation should be denied as a matter of administrative discretion and counsel's motion will, therefore, be denied.

The congressional comment referred to was most probably that found in Senate Report No. 1137 which

accompanied the bill that became the 1952 Act (S. Rep. No. 1137, 82nd Cong., 2nd Sess., p. 25):

> The term "exceptional and extremely unusual hardship" requires some explanation. The committee is aware that in almost all cases of deportation, hardship and frequently unusual hardship is experienced by the alien or the members of his family who may be separated from the alien. The committee is aware, too, of the progressively increasing number of cases in which aliens are deliberately flouting our immigration laws by the processes of gaining admission into the United States illegally or ostensibly as nonimmigrants but with the intention of establishing themselves in a situation in which they may subsequently have access to some administrative remedy to adjust their status to that of permanent residents. This practice is grossly unfair to aliens who await their turn on the quota waiting lists and who are deprived of their quota numbers in favor of aliens who indulge in the practice. This practice is threatening our entire immigration system and the incentive for the practice must be removed. Accordingly, under the bill, to justify the suspension of deportation the hardship must not only be unusual but must also be exceptionally and extremely unusual. The bill accordingly establishes a policy that the administrative remedy should be available only in the very limited category of cases in which the deportation of the alien would be unconscionable. Hardship or even unusual hardship to the alien or to his spouse, parent, or child is not sufficient to justify suspension of deportation. To con-

tinue in the pattern existing under the present law is to make a mockery of our immigration system.

Both courts below found the reference to the Congressional policy not to be improper (R. 6, 21–23). It would only be improper if we were to read the original grant of *discretion*—as distinguished from *eligibility* for relief—made in 1940 as being limited to the circumstances then existing, without regard to later developments. We submit it is far more reasonable to assume that Congress intended the Attorney General to administer the law in accordance with developing conditions, particularly as disclosed in subsequent Congressional proceedings. In fact, since the grant of suspension of deportation must under the law be submitted to Congress for approval (*supra*, pp. 3, 5), it would be futile for the Attorney General to disregard current policies of Congress in exercising his discretion. That Congress should have intended to grant the Attorney General "unfettered" discretion (*Jay* v. *Boyd*, 351 U. S. 345, 354), subject to the sole limitation that he might consider everything except those things which Congress should subsequently find to be important, would indeed be a strained construction.

Nor is our view contrary to the provisions of the Savings Clause included in the 1952 Act, Section 405 (a) (*supra*, pp. 5–6). That clause requires that proceedings for suspension commenced before the effective date of the later act continue to be governed by the provisions of the 1917 Act. That was done in this case; otherwise, petitioners could not have